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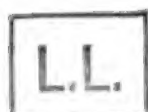
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REPORTS
OF
CASES IN LAW AND EQUITY.

ARGUED AND DETERMINED IN THE
PREME COURT OF THE STATE OF GEORGIA.

INCLUDING

August Term, 1860, at Atlanta; The November Term, 1860. at
Willedgeville: The November Term, 1860, at Athens:

AND PART OF

The January Term, 1861, at Savannah.

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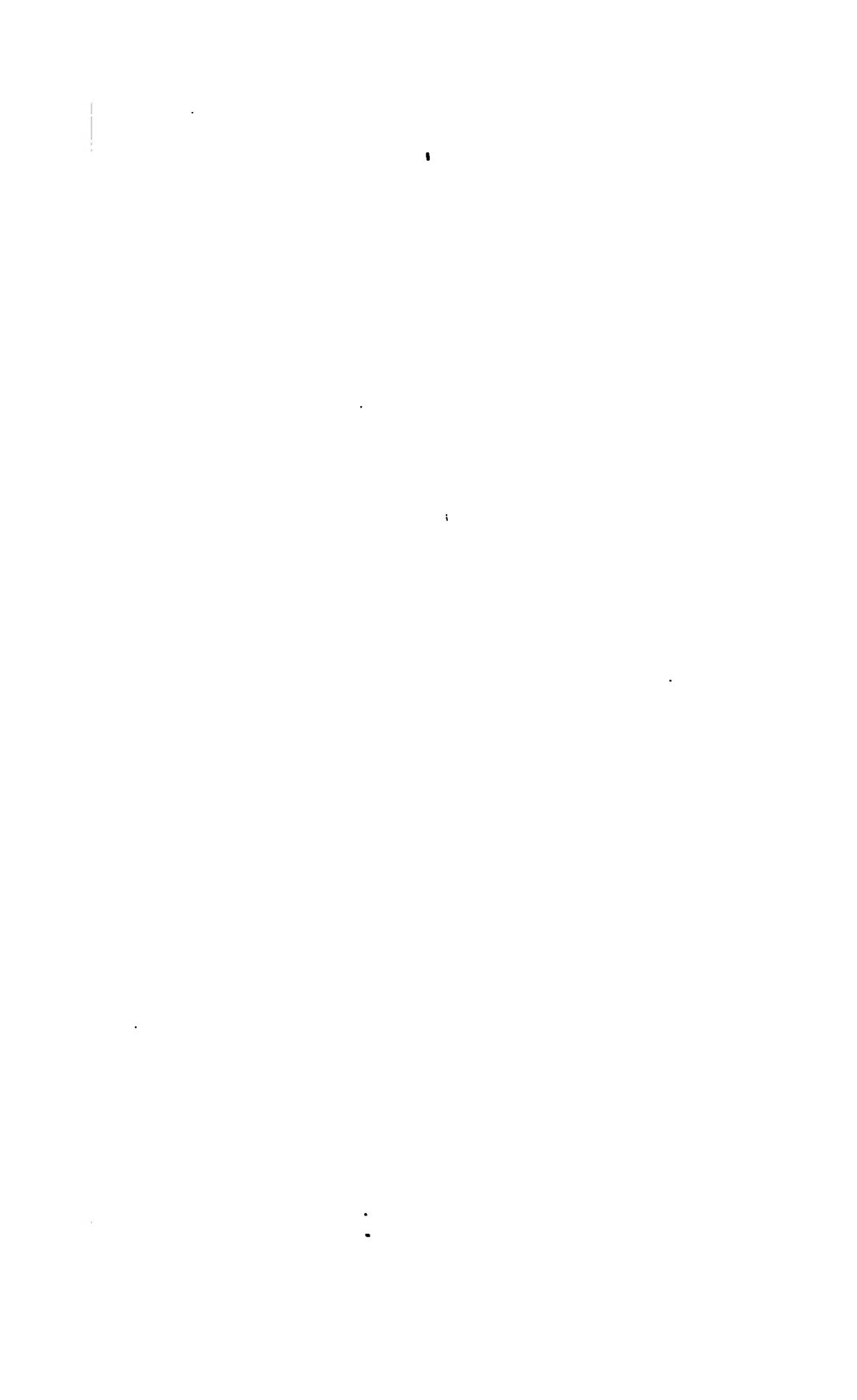


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the rule prescribed by that Act, that the arbitrators may settle compensation for their services, may be adopted by the Court as a proper rule in like cases. It was no error in the arbitrators in this case to pay off the balance due to defendant with the negroes on which the advances and debts were contracted, or to allow a credit for the hire of complainant's negroes, when complainant has received the corresponding benefit from the advances made and the surplus left.

It is not compound interest to add interest on the balance up to the credit and deduct credit from the sum of principal and interest, and then to add interest on balance, &c., when the credit exceeds the interest, &c.; but such rule is the one prescribed by the statute.

As this arbitration was not under the arbitration Act of 1856, it was not error not to furnish the parties with copies of the award.

The children of complainant had no interest in the matters in arbitration, and it was not necessary that they should be parties, nor have their interests been affected by the award.

2. There was no error in allowing defendant and the husband to be sworn as witnesses in the arbitration, neither having sworn to anything untrue, or prejudicial to complainant.

3. The award is in the highest degree beneficial to complainant, and ought not to be disturbed.

In Equity, from Murray Superior Court. Decided by Judge CROOK, at the October Term, 1859.

Peyton L. Wade instituted two actions of Trover in Murray Superior Court, against Jacob S. P. Powell, for the recovery of divers negro slaves. In one of the actions he was defendant in his own right, and in the other he was plaintiff as trustee for Mrs. Sarah A. Powell. The said Wade, also, commenced an action of Ejectment in Whitfield Superior Court, in favor of John Doe, ex-demise, Peyton L. Wade, et al, against Richard Roe, casual ejector, and Samuel Street, tenant in possession. Jacob S. P. Powell commenced an action of Trover, in Whitfield Superior Court, against Jesse Wade, for the recovery of divers negro slaves. Sarah A. Powell, by her next friend, James Edmondson, filed her Bill in Equity, in Murray Superior Court, against Peyton L. Wade and Jacob S. P. Powell, for Discovery, Relief, and Injunction. She also filed a similar Bill in Whitfield Superior Court, against Jesse Wade, Peyton L. Wade, and Jacob S. P. Powell. John L. Edmondson, in the place of Dawson A. Walker, trustee, &c., and Jacob S. P. Powell, filed their Bill in Equity in Whitfield Superior Court, against

stated amounts, and if the husband made these payments, the negroes were in that case to be the property of complainant; if not paid, the money was to be made out of the remaining thirteen. Afterwards a new agreement was entered into *with the complainant*, in which the balance is stated to be \$3,200, \$500 of which was to be paid in January, 1852, the balance in five equal annual installments. If this amount was paid up promptly at the times stated, with the interest, defendant was to convey the thirteen negroes to the complainant, subject to the same trust as contained in her father's deed; if payment were not made, the agreement to be void, and defendant was to make the money out of the negroes. The defendant subsequently advanced for the use of the separate state of the complainant \$1,012 and for the husband \$400. No part of the \$3,200, or \$1,012, or \$400 being paid to defendant, he commenced an action of trover for the thirteen negroes; also a separate action, as trustee, for those contained in the deed from complainant, to take them from the possession of the husband. The complainant filed a bill against defendant for account of the hire of some of the trust negroes defendant had in 1849 and 1850, that was included in the settlement with the husband in January, 1851; also for account of the hire of the twenty-two negroes included in the conveyance from her husband, and from Martin to defendant, also for all the assets that the husband had turned over, and for an account generally of his trust from his acceptance. The husband brought trover for the eleven negroes, taken by defendant in settlement in January, 1851. Some other suits, either directly or collaterally, were pending between the parties. The solicitors of the complainant, the husband, and the next friends of complainant in her bill, agreed in writing with the defendant for the purpose of putting an end to the litigation and making a final and full settlement of all matters in dispute between them, to refer them to two arbitrators named therein who were to select an umpire, and this agreement, or rule of submission so agreed on, was made the rule of the Court. In accordance with the agreement, the whole of the twenty-two negroes and increase, both those in the possession of defendant as well as those in the possession of complainant, were delivered to the arbitrators to dispose of according to the award. The arbitrators and umpire took a full account on both sides from the beginning, and for the balance found to be due to defendant, paid him off in negroes, at prices put upon them by the arbitrators; settled their own fees, &c. This award was made the judgment of the Court. Complainant filed a bill to review and reverse that award. *Held*

1. That a bill of review did not lie to correct the errors of this award or judgment.
2. That the attorney and solicitors of complainant had power to make the reference under the sanction of the Court, without the consent of complainant.
3. It was not error in the arbitrators to settle the accounts between defendant and husband, especially as such settlement inured to the benefit of complainant.
4. That it was no error for the next friend to sign and agree to said submission, and that he did so only made it the more perfect.
5. In arbitrations, other than those provided for by the arbitration Act of 1856,

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- the rule prescribed by that Act, that the arbitrators may settle compensation for their services, may be adopted by the Court as a proper rule in like cases.
6. It was no error in the arbitrators in this case to pay off the balance due to defendant with the negroes on which the advances and debts were contracted, or to allow a credit for the hire of complainant's negroes, when complainant has received the corresponding benefit from the advances made and the surplus left.
 7. It is not compound interest to add interest on the balance up to the credit and deduct credit from the sum of principal and interest, and then to add interest on balance, &c., when the credit exceeds the interest. &c.; but such rule is the one prescribed by the statute.
 8. As this arbitration was not under the arbitration Act of 1856, it was not error not to furnish the parties with copies of the award.
 9. The children of complainant had no interest in the matters in arbitration, and it was not necessary that they should be parties, nor have their interests been affected by the award.
 10. There was no error in allowing defendant and the husband to be sworn as witnesses in the arbitration, neither having sworn to anything untrue, or prejudicial to complainant.
 11. The award is in the highest degree beneficial to complainant, and ought not to be disturbed.

In Equity, from Murray Superior Court. Decided by Judge CROOK, at the October Term, 1859.

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Peyton L. Wade, for discovery, relief, injunction, &c. On the 15th day of April, 1857, whilst all these cases were pending and undetermined, it was agreed, in writing, that—“In order to settle the above and foregoing cases, and all matters in dispute between the parties thereto, they have agreed, and do hereby agree, to refer the same to the arbitrament and award of Dawson A. Walker and John W. Hooper, and an umpire to be selected by the said Walker and Hooper, to decide any matter of law or fact, on which said Walker and Hooper may not be able to agree, to be settled and decided according to the principles of Equity and Justice, on the following basis, that is to say: All the amount, to wit, thirty-one hundred dollars, paid by Peyton L. Wade to Robert Martin, and a judgment in favor of Peyton L. Wade against the said Jacob S. P. Powell, with the legal interest thereon from the time of its payment, shall be allowed the said Peyton L. Wade; and all the money that has been advanced or loaned to, or paid for the said Jacob S. P. Powell, by the said Peyton L. Wade; and all that may be due and owing by the said Jacob S. P. Powell to the said Peyton L. Wade, with the legal interest thereon, from the time it was advanced, loaned, paid, or became due, shall be allowed the said Peyton L. Wade; and, also, the amount paid by the said Peyton L. Wade for a note made by the said Jacob S. P. Powell, which is now sued in Murray Superior Court, with the legal interest on the amount paid, shall be allowed to the said Peyton L. Wade; and, also, the amount paid on a draft drawn by the said Jacob S. P. Powell on Peyton L. Wade, in favor of C. T. Cunningham & Co., with the legal interest on the amount paid, shall be allowed the said Peyton L. Wade; and, also, the money that has been paid by Peyton L. Wade, with the legal interest thereon, for a settlement of land called the Seaborn Jones Place, and for which the action of Ejectment, before stated, was brought, (the action being now enjoined by a Bill in Equity,) shall be allowed the said Peyton L. Wade; and, also, all the money that has been advanced to, or paid for, the said Sarah A. Powell and her children, or either of them, and all goods or other things that have been purchased for the said Sarah A. Powell and her children, or either of them, by the said Peyton L. Wade, with the legal interest thereon, shall be allowed the said Peyton L. Wade; and, also, all the articles, of every kind, furnished

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for the trust estate, and all the money advanced, paid, laid out and expended by the said Peyton L. Wade to and for the use and benefit of the trust estate in his hands, with the legal interest thereon, shall be allowed the said Peyton L. Wade. On the other hand, the said Peyton L. Wade shall account for and allow as a credit on the money advanced by, or that may be due and owing to him; all the money, solvent notes, cotton, corn, peas, fodder, mules, horses, hogs, wagons, sheep, or any other thing or things of value which he has received from the said Jacob S. P. Powell, or the trust estate, to be allowed and valued at a fair price at the time they, and each of them, were received; and the said Peyton L. Wade shall account for and allow as a credit on the money advanced by, or owing to him, a fair hire of each and all the negroes belonging to the trust estate, and for each and all the negroes in dispute between the parties, for all the time the said Wade has had the said negroes employed for him or worked for his use and benefit; the hire to be estimated as if hired on a twelve months' credit, and to be allowed as a credit at the end of each and every year, but in fixing the amount of hire, the expense of feeding and taking care of the old and infirm negroes, the clothing, feeding and nursing the young and children, shall be taken into the account, and the hire assessed by taking all the negroes, young and old, big and little, together. In taking the account between the parties, if Peyton L. Wade should be due and owing more than is due him, the interest is to be counted against him in the same way and manner as is herein before provided for him, and he is to pay up whatever sum he may be due and owing, and deliver up the negroes that are in his possession and in dispute; but if more is found to be due the said Peyton L. Wade than he has received, the amount is to be paid him immediately, or a note with approved security, payable months after date, with interest from date, shall be given him for the sum due him; and if neither of these is done, said Peyton L. Wade is to keep the negroes now in his possession, or enough of them, at a fair valuation to be made by the arbitrators, to pay the amount due him; and if the negroes in the possession of the said Wade are not enough to pay him at valuation what may be due him, then he is to take enough of the negroes at valuation, in the possession of the said Jacob S. Powell, and for which said Wade has sued said Powell, in his

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own right, in the Superior Court of Murray county, to pay the amount due him; and the said Wade is to keep such of the negroes as he chooses, to pay himself, at valuation, first taking of the negroes in his possession; but if this is done, it is not to affect the title that the said Peyton L. Wade now has or claims to said negroes, it being the distinct understanding of the parties hereto, that this agreement is made merely as the basis of a *compromise* of disputes, for the purpose of putting an end to litigation, neither of the parties admitting, or intending to admit, a want of title in them to any of the property in dispute, but simply are willing to compromise the matters in dispute on the terms herein stated. And in order to carry into effect the award that may be made, without let or hindrance, it is hereby agreed by the parties, that all the negroes in dispute, which are in the possession of the said Peyton L. Wade, and all the negroes in dispute which are in the possession of the said Jacob S. P. Powell, shall be placed in the possession and under the control of the arbitrators before the award is made, to be, by them, delivered to the party or parties entitled thereto, according to the award and decision. And it is further agreed, that all the cases before stated shall stand as they are, until the award is made and executed; and it is further agreed that all the evidence now taken in said cases, shall or may be used before the arbitrators; and it is further agreed that the costs in each of said cases shall be paid as the arbitrators may decide, according to Justice and Equity; and it is further agreed, that the arbitrators shall meet at Dalton, on the first day of September next, to decide the matters in dispute."

This agreement was dated the 15th of April, 1857, and signed by J. S. P. Powell, J. A. R. Hanks, James Edmondson; Augustus R. Wright, Attorney and Solicitor for the trust estate; John W. H. Underwood and Dawson A. Walker. Attorneys for Mrs. Sarah A. Powell, and trustees of Mrs. Street; and John W. Hooper, Warren Akin and J. A. W. Johnson, Attorneys and Solicitors for Peyton L. Wade.

At the April Term, 1857, of Whitfield Superior Court, it was "Ordered by the Court, that the cases mentioned and set forth in the foregoing agreement, and submission, be referred to arbitration according to the stipulations contained in said submission and agreement, and that the award that may be made shall be the final judgment of the Court, freed

from all objections and exceptions, and that the Judge of the Superior Court of the Cherokee Circuit, at chambers, in vacation, shall have the right and power to order the award as the judgment of the Court, to be entered on the Minutes of the Superior Court of Murray county, and of Whitfield county, and to pass all orders, judgments and decrees, necessary and proper for carrying the said award and judgment into effectual execution; and may remove the trustees, and appoint new ones, and pass every order, necessary and proper, for freeing the trust estate from debts or encumbrances, in the same manner and to the same extent as he could or might do by the aid and concurrence of a special jury, at a regular Term of the Superior Courts in the counties aforesaid." This order was signed by Warren Akin and John W. Hooper, Solicitors and Attorneys of Peyton L. Wade; J. W. H. Underwood and Dawson A. Walker, Solicitors for Mrs. Sarah A. Powell and others as he is marked on the record; James Edmondson, next friend of Mrs. S. A. Powell, and by the Hon. Joseph E. Brown, Judge of the Superior Court, presiding.

Thomas R. R. Cobb, Esq., was selected as umpire, by the said John W. Hooper and Dawson A. Walker, and by them requested to act with them and hear the evidence under said submission.

The arbitrators and umpire met at the time and place designated in the submission, and made up and rendered the following award, to wit:

"We, the arbitrators, appointed under a submission and order of the Superior Courts of the counties of Murray and Whitfield, having met at Dalton on the first, and second, and third days of September, 1857, and having made choice of Thomas R. R. Cobb as the umpire under said submission, and having heard all the evidence submitted by the parties and their counsel, and considered fully the several matters submitted to us, have agreed upon the following award—the said umpire deciding all questions of difference as they arose between us in the investigation—and we do hereby award as follows:

"We find that there was due and owing Peyton L. Wade, on a settlement of the accounts between the parties, on the first day of September, 1857, Nine Thousand Two Hundred and eighty-seven dollars and forty-four cents. We annex hereto, marked Exhibit A, a statement by which it will be

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seen what amounts are allowed the parties, and the calculation by which this result was obtained. For the payment of this amount, we award that Peyton L. Wade retain the following negroes in his possession, at the following prices and valuations as agreed on by us (the other parties declining to pay the money or give the note with approved security, as provided in the submission,) viz: Mingo, an old man, \$100.00; Dinah, an old woman, \$1.00; Harry, a man, \$1,000.00; Juby, a man, \$800.00; Sue, a woman, \$800.00; Jeff, a young man, \$1,100.00; Lucy, a young woman, \$900.00; Rachel, a girl, \$700.00; Delia, a girl, \$500.00; Ben, a boy, \$400.00; Prince, a boy, \$200.00; and Lovey, an old woman, \$1.00, making in all the sum of \$6,502.00. We further award, and have delivered, to the said Peyton L. Wade, the following negroes, at the following prices and valuations as fixed and agreed on by us: Daniel, a mulatto boy, \$1,000.00; Reuben, a mulatto boy, \$800.00; Jim, a negro man, \$1,050.00; Jim, a small child, son of Bessy, \$185.44, making in all the sum of \$2,985.44, and which, added to the first lot of negroes aforesaid, makes \$9,487.44. Deduct from this sum the amount found to be due to Wade, and there is left the sum of \$250.00, which amount Mr. Wade will pay to the umpire for Mr. Powell's share of his fee. We award, that, in all the cases submitted, the fees of the witnesses shall be paid by the parties by whom the same were subpoenaed respectively, and that the costs of the officers of Courts, including costs of commissions for interrogatories, be paid by the plaintiffs and complainants in each case respectively.

4. "We award the following fees to the arbitrators and umpire in this matter, to be paid equally by the parties, i. e., one half by Peyton L. Wade, and the other half by J. S. P. Powell and the trustee of Mrs. Powell—the fees of the arbitrators being settled by the umpire, and the fee of the umpire having been settled by the parties, viz: To John W. Hooper, \$500.00; to Dawson A. Walker, \$500.00; and to Thomas E. R. Cobb, \$500.00."

This award was signed by the arbitrators and the umpire.

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"EXHIBIT A."

1849. *Amounts found due to P. L. Wade.*

April 1st.	Amount paid to Robert Martin,.....	\$3,100 00
"	of Judgment vs. J. S. P. Powell,...	1,700 00
"	advanced on Cotton,.....	400 00
"	paid Snider, Lathrop & Nevitt for Goods,.....	29 49
"	paid William Remshart, for Goods,	9 75
"	" N. B. Knapp,.....	4 50
"	" for one barrel of Flour,.....	8 69
"	" for 30 yards Osnaburgs,.....	3 00
"	" to Mr. Eastman,.....	5 75
"	" to Snider, Lathrop & Nevitt, for Carolina,	30 06
"	paid for a Bonnet,.....	6 00
"	" to S. Solomons, for Goods,...	338 87
"	" for 1,360 doz. Oats, at 15c. per dozen,.....	204 00
"	paid for articles bought of S. Jones,	332 00
"	" for 3,000 bush. of Corn, bought of S. Jones,.....	600 00
"	paid for Hogs and Cows to S. Jones,	152 50
"	" for Hogs and Cows to Norton,.	60 00
"	" to P. L. Wade, Jr.,.....	30 00
"	" to J. Burns, for Oxen,.....	65 90
"	" for articles bought of Norton,.	26 75
"	of Cash advanced at Dalton,.....	200 00
"	paid for 600 bushels of Corn, bought of Norton,.....	100 00
"	paid to J. D. Wade, for carrying ha groes, &c.,.....	51 13
"	paid expenses of Carolina from Murray,.....	16 00
"	paid Jesse Wade's account for Pro- visions, &c.,.....	536 85
Total,.....		\$8,010 33

1850. *Amounts found due to P. L. Wade.*

Jan. 1.	The Seaborn Jones' and Wade place,.....	\$2,500 00
	Cash through Jesse Wade,.....	100 00
	Amount paid Snider, Lathrop & Nevitt,.....	86 84
"	" O. Johnston,.....	20 42
"	" M. Eastman,.....	33 44

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"	"	Expenses of Miss Carolina,,.....	18 88
"	"	Snider, Lathrop & Nevitt,.....	4 68
"		of Jesse Wade's ac't for provisions,..	325 00
"		of Rent of Norton place,.....	100 00
Total,.....			\$3,198 26

1851.

Jan. 6.	Cash paid in Scriven,.....	\$ 700 00
"	One Umbrella,	2 00
"	Cash paid Savannah Republican,.....	11 00
"	" Southern Cultivator,.....	3 00
"	loaned to pay Mrs. Farmer's land,.....	500 00
"	Amount of Blacksmith's account for 1851,....	33 90
"	Rent of Norton place for 1851,	150 00

Total,.....\$1,399 90

1852.

"	Rent of Norton place for 1852,.....	\$150 00
"	Amount paid for Jesse Miller's Note,.....	400 00

Total,.....\$550 00

1853.

Feb. 11.	Draft in favor of C. T. Cunningham & Co.,...	\$1,012 64
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1855.

October.	Amount paid to John B. Powell, for medical services,.....	\$130 00
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1849. *Credits to which J. S. P. Powell is entitled.*

April 1.	Two Notes on Erwin,.....	\$1,000 00
"	49 bales of Cotton sold,.....	1,000 00
"	Corn, Potatoes, Peas, Hogs, Sheep, plantation tools, &c., delivered in Scriven,.....	807 92
"	Four Mules, at \$75 each,.....	300 00
"	Amount claimed for Rice,.....	9 69
"	Amount claimed for Lumber,.....	4 50
"	Amount allowed for expenses and work on Centre place,	130 12
"	Board of Mr. Wade and family (four months,)	150 00
"	Providence for horses and servants, same time,	25 00
"	Hire of negroes for 1849, deducting expenses,	1,221 00

Total,.....\$4,648 23

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1850.

Hire of negroes for 1850, deducting expenses, \$1,410 00

1851,

Hire of negroes for 1851, deducting expenses, \$480 00

Smett's Draft, 70 79

Total, \$550 79

1852.

Hire of negroes, for 1852, deducting expenses, \$480 00

One Bay Mare, 125 00

Two Mules, 125 00

Oats, \$75, and Shoats, \$13, 88 00

Total, \$818 00

1853.

Hire of negroes, deducting expenses, \$380 00

1854.

Hire of negroes, deducting expenses, \$395 00

1855.

Hire of negroes, deducting expenses, \$400 00

1856.

Hire of negroes, deducting expenses, \$410 00

1857.

Hire of negroes, deducting expenses, \$275 00

Settlements of accounts on the amounts found due by us.

1849.

Amount paid by P. L. Wade, \$8,010 33

Interest from the 1st June to 1st January, 1850, 327 08

\$8,337 41

Deduct credits for 1849, \$4,648 23

Interest for same time, 189 79 4,838 02

Balance due 1st January 1850, \$3,499 39

Interest for one year, to January 1st, 1851, 244 95

\$3,744 34

Add amount paid in 1850, \$3,198 26

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Interest for eleven months,.....	205 22	3,403 48
		<hr/>
		\$7,147 82
Deduct credits for 1850,.....		1,410 00
		<hr/>
Balance due 1st January, 1851,.....		\$5,737 82
Interest for one year, to 1st January, 1852,...		401 54
		<hr/>
		\$6,139 46
Add amount paid in 1851,.....	\$1,399 90	
Interest for seven months,.....	57 15	1,457 05
		<hr/>
		\$7,596 51
Deduct credits for 1851,.....	\$550 79	
Interest allowed,.....	1 25	552 04
		<hr/>
Balance due 1st January, 1852,.....		\$7,044 47
Add interest for one year,.....		493 10
		<hr/>
		\$7,537 57
Add amount paid in 1852,.....	\$550 00	
Interest allowed,.....	28 00	578 00
		<hr/>
		\$8,115 57
Deduct credits for 1852,.....	\$818 00	
Interest allowed,.....	11 88	829 88
		<hr/>
Balance due 1st January, 1853,.....		\$ 7,285 69
Interest from 1st Jan. 1853 to 1st Sept. 1857,		2,379 94
Amount paid out in 1853,.....		1,012 64
Interest from 11th Feb. 1853 to 1st Sep. 1857,		321 73
Amount paid out in 1855,.....		130 00
Interest from 1st Oct. 1855 to 1st Sep. 1857,...		17 44
		<hr/>
Total,.....		\$11,147 44
Deduct credits for 1853,.....	\$ 380 00	
" " " 1854,.....	395 00	
" " " 1855,.....	400 00	
" " " 1856,.....	410 00	
" " " 1857,.....	275 00	
		<hr/>
	\$1,860 00	1,860 00
		<hr/>
Balance due P. L. Wade Sep. 1st 1857,.....		\$9,287 44

This award was afterwards made the Judgment of the Superior Courts of Murray and Whitfield counties, by orders and decrees regularly had and taken in accordance with the terms and stipulations of the submission and rule of reference aforesaid.

At the April Term, 1858, of Whitfield Superior Court, a motion was made to set aside and vacate the Judgment of the Court, making the said award the Judgment of the Court, which motion was based upon the following grounds, to-wit:

1st. Because the arbitrators failed to comply with the Statute Laws of Georgia in such cases made and provided, and because of the copy affidavits of James Edmondson and Sarah A. Powell hereto attached, marked 1 and 2.

2d. Because a capital mistake was made by the said arbitrators, and acknowledged to one of the parties to said arbitration afterwards.

3d. Because the arbitrators exceeded their authority in going outside of the basis of submission, and in acting on motives and making an award on matters not submitted.

4th. Because there was no award made, according to the basis of submission, and the causes of difference which were submitted.

5th. Because the calculations and the principles upon which interest was computed, were contrary to the Law.

The affidavit of James Edmondson referred to in the first ground of the motion, states, "That he, being very ill, was in the room but once, and then only for a short time, whilst the arbitrators were investigating the matters submitted as aforesaid, and that he has not seen or been furnished with a copy of the award made by the arbitrators."

The affidavit of Sarah A. Powell, referred to, states: "That she never signed, or authorized any one for her, to sign the submission, and that the reference of the cases to arbitrators was made without her knowledge or consent, and without consultation with her, and that she has never been furnished with a copy of the award."

Opposed to these affidavits was the affidavit of John W. H. Underwood, Esq., stating: "that he was one of the counsel of Mrs. Sarah A. Powell in the cases before stated, and that in addition to his professional obligation he felt great solicitude for the welfare of Mrs. Powell, and, owing to the complicated character of the controversy involved in the cases, submitted

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to arbitration his judgment, as a lawyer, approved the reference, that he explained the whole matter to Mrs. Powell, giving her full information as to what matters were to be submitted, the basis on which they were to be submitted, and to whom they were to be submitted, and that she not only did not complain of the reference, but fully approved it and gave her consent to it."

Pending this motion to set aside said award, and the order making it the Judgment of the Court, the said Sarah A. Powell, by her trustee, James Edmondson, filed her Bill in Equity in Whitfield Superior Court, alledging: That she is a *feme couverte*, and wife of Jacob S. P. Powell; and that on the seventh day of March, 1849, General James D. Erwin, of Barnwell District, in the State of South Carolina, executed and delivered his certain deed, conveying to Peyton L. Wade thirty-three negro slaves, to-wit: Andrew, the elder, and Andrew, the younger; Rosey Ann, Lewis, Anthony, Prince, Cain, Becky, two Henry's, Sam, Jane, Nelly, Joe, Albert, Peggy, Eliza, Susan, Nero, Molly, Joel, Nancy, Georgiann, Mary, Abby, Nelson, Emma, Rufus, Dick, Frank, Lavinia, Milzy and Lizzie, together with the future increase of said slaves, to be held by the said Peyton L. Wade in trust for the sole and separate and exclusive use of the complainant, for and during her natural life; the said slaves, nor their labor or hire, to be subject in any manner whatsoever to the debts, contracts or agreements of the said Jacob S. P. Powell, the husband of the complainant. That the said deed of trust also stipulated, that the said Jacob S. P. Powell should not exercise the slightest control, or take the slightest interest in the said negro slaves, and that, after the death of the complainant, the said negro slaves should be delivered to and become the absolute property of such child, or children, as the complainant shall leave at her death, share and share alike; which trust the said Peyton L. Wade then and there accepted. That about the same time the said Peyton L. Wade received from Robert Martin, of the city of Charleston, a bill of sale for the following negro slaves, to-wit: Mingo, Delilah, Lovey, Sarah, Leah, Jeff, Henry, Barchell, Chesterfield, Julia, Cornelia, Reuben, Daniel and Sally, which negroes the said Martin had purchased, for the use and benefit of the complainant, on the first Monday in February, 1845, at a public sale thereof by the Commissioner in Equity, and turned over to

complainant on condition that she should pay the purchase money of said slaves out of the proceeds of her planting operations; that the amount due said Martin at the time of the execution of the deed of trust, as aforesaid, was about forty-seven hundred dollars; that the complainant reduced said sum by transfer of the place on which she then lived, and by cash payments, to the sum of thirty-one hundred dollars; that by an agreement between the complainant and the said Peyton L. Wade, the said Wade paid the sum of thirty-one hundred dollars to the said Martin, and took a bill of sale of said last mentioned negroes to himself and in his own name, to secure the repayment to him of the said sum of thirty-one hundred dollars. That on the 11th day of April, 1849, an agreement in writing was made and entered into, by and between the said Peyton L. Wade and the said Jacob S. P. Powell, in which it was recited "that the said Wade had purchased of the said Powell seven negro slaves, to-wit: Dempsey, Henry, Bess and her three children, and Jim; and the said Wade had also purchased from Robert Martin, of Charleston, South Carolina, fifteen slaves, all of which were then the property of the said Wade." That said agreement stipulated that the said Jacob S. P. Powell should take the management of the said slaves and pay to said Wade the sum of fifty-eight hundred dollars by the first day of January, 1851, with the lawful interest thereon, from the first day of January, 1850; that, if said Powell should fail to pay the said principal and interest during his life, all of said negroes should be liable and subject to said Wade for any balance due him; that in the meantime the said Powell should have no liberty to sell or dispose of any one of said negroes without said Wade's express consent; that if any one else should, by contract with said Powell, control or attempt to control any of said negroes without Wade's consent, the said Wade should interpose his right in the premises, and that when all of said sum of money with the interest thereon should be fully paid, the said Wade should deed and settle all of said negroes, and their issue and increase, on such person or persons as the said Powell might name.

The bill further alleges: That at the time the said Wade paid to Martin the thirty-one hundred dollars aforesaid, the complainant, through said Powell, her husband, placed in said Wade's hands two promisory notes on James D. Erwin,

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payable to the complainant, for five hundred dollars each, given in payment for a tract of land sold by complainant to said Erwin. That complainant, also through her said husband, turned over to said Wade fifty-nine bales of cotton, one thousand bushels corn, one hundred bushels of cow-peas, two four-horse wagons, six mules, one thousand pounds of bacon, five hundred pounds of lard, fifty-nine head of sheep, ninety-three head of hogs, two carriages, a large amount of plantation tools and a considerable quantity of other property, together with about twenty-four full working hands, all of which the said Wade kept, used, and worked for his own use and benefit during the year 1849, and (with the exception of four of the negroes) also during the year 1850, and some of said negroes since that time, for none of which said Wade has ever accounted to complainant. That said Wade had combined with the said Jacob S. P. Powell and one Jesse Wade, to cheat the complainant out of the proceeds and revenues of her estate, by settling and paying off with the complainant's funds the private indebtedness, pretended or real, of the said Jacob S. P. Powell and Jesse Wade to the said Peyton L. Wade. That the complainant had often called on the said Peyton L. Wade for an accounting and settlement, and was met only by propositions to discount and settle large claims, real or pretended, which the said Peyton L. Wade claimed to hold against the said Powell; that, abandoning all hope of a fair settlement with the said Peyton L. Wade, she filed a Bill in Chancery, in the Superior Court of Murray county, against the said Peyton L. Wade and Jacob S. P. Powell, and, also, a Bill in Equity, in the Superior Court of Whitfield county, against the said Jesse Wade, Peyton L. Wade, and Jacob S. P. Powell, calling on them for a full accounting and settlement to and with the complainant in the premises, and praying the appointment of a new trustee instead of the said Peyton L. Wade. That whilst these bills were pending, the said Peyton L. Wade and the Solicitors of the complainant agreed to refer the matters in controversy in said bills to arbitration; that said agreement of reference was made without the knowledge, authority, approbation or consent of the complainant, and upon a basis unknown to complainant, and at variance with her wishes; that a rule or order of Whitfield Superior Court was had and passed, referring said cases according to the agreement, and that the

arbitration took place on the first day of September, 1857, after which orders were passed by the Judge, at chambers, confirming and carrying out the award made by the arbitrators; that said award was made only upon the separate matters between Peyton L. Wade and Jacob S. P. Powell, who were co-defendants in the said Bills in Equity, filed and exhibited by the complainant, and did not touch and settle the matters of said bills. That James Edmondson, being only the next friend of the complainant, had no sufficient right or authority to sign and agree to said submission and basis of reference; that said arbitrators passed upon matters outside of the submission, and awarded to themselves five hundred dollars each, whilst they were Attorneys in the cases referred, at a stipulated fee of one thousand dollars each; that said arbitrators and umpire exceeded their authority by selling two or three of the complainant's negroes to said Wade, for the purpose of paying the fees of said arbitrators, and that, too, without the consent of complainant or her next friend, and before the award was declared. That said arbitrators and umpire transferred and delivered to the said Peyton L. Wade sixteen valuable slaves belonging to the complainant, and herein before mentioned, to-wit: Mingo, Dinah, Lovey, Sue, Jeff, Leny, Rachel, Delilah, Ben, Prince, July, Henry, James, Reuben, Daniel and little Jim, worth in all twelve thousand dollars or some other large sum of money, and passed over to said Peyton L. Wade by the said arbitrators and umpire to pay certain damages and accounts, pretended or real, which the said arbitrators found to be due by the said Jacob S. P. Powell to said Peyton L. Wade, which transfer was in violation of the terms and stipulations of the deed of gift made by the said James D. Erwin, as aforesaid, and which was appended to the said Bills in Equity referred as aforesaid; that said arbitrators proceeded to charge the said Peyton L. Wade with the price of the said negroes so transferred by the arbitrators as aforesaid, and for cotton, and for a large amount of stock and articles of various sorts, and passed the same all to the credit of the said account which the said Peyton L. Wade had prepared against the said Jacob S. P. Powell individually; that said arbitrators took no account of the sum due for the hire and labor of complainant's negroes, when used by said Peyton L. Wade, as herein before charged and set forth; that the arbitrators allowed the said Peyton

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L. Wade compound interest on all of his said accounts and demands which he had preferred against the said Jacob S. P. Powell, and allowed no interest at all upon the amounts estimated as due the complainant for the use, hire, and so forth, of her negroes, all of which will appear by reference to the submission, award, orders of Court, rule of reference, &c., which are made a part of complainant's bill; that no copy of said award was ever furnished to the complainant; or to her said next friend, or to the said Powell; that complainant's children, who are the remainder-men of said estate, were unrepresented in said arbitration. That no award was ever made in accordance with the submission and rule of reference, but that the said award is a mere settlement of their own private and individual accounts, between the said Peyton L. Wade and said Powell, and a conversion of sixteen of the complainant's negroes to pay the private debts of said Powell: that the said award was placed on the Minutes of Murray and Whitfield Superior Courts, in vacation, on the 18th of September, 1857, of which complainant had no knowledge for several months, and that, so soon as complainant could do so, after ascertaining what had been done, she instituted motions in the Superior Courts of Whitfield and Murray counties, to set aside the said award, and the orders confirming the same: that said motions are now pending and undetermined.

The bill prays that the award may be set aside, annulled and vacated, together with all the orders of Court, or the Judge at chambers, confirming the same; that said Bills in Equity may be reinstated and stand as they were before the submission was made; that an injunction issue, restraining the said Wade and Powell from selling or carrying away any of said negroes, and from wasting or disposing of any of the funds or property of complainant's said trust estate; that the defendants, Peyton L. Wade and Jacob S. P. Powell, answer the bill; and for general relief.

To this bill there was a demurrer filed for want of Equity.

The presiding Judge overruled the demurrer, and that decision is the error complained of in this case.

WARREN AKIN and T. R. R. COBB, for plaintiff in error.

A. R. WRIGHT and JACOB S. P. POWELL, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

James D. Erwin, the father of Mrs. Sarah Powell, the complainant in this Bill, on the first day of March, 1849, conveyed to the defendant in the Bill, in trust for Mrs. Sarah Powell and the wife of Jacob S. P. Powell, thirty negroes. The defendant accepted the trust and entered upon the performance of its duties. Subsequently, and on the 7th day of March, 1849, Jacob S. P. Powell conveyed to the defendant, Wade, seven negroes, in consideration of \$2,000: afterwards, and about the last of March, 1849, one Robert Martin conveyed to defendant fifteen negroes, in consideration of \$3,100 paid him by defendant therefor. These fifteen negroes had been, previously, the property of Jacob S. P. Powell, but had been sold at Sheriff's sale, as the property of Powell, and bid off by Martin. This \$3,100, paid by defendant for the negroes, seems to have been the amount that Martin had paid for the negroes at Sheriff's sale, and defendant advanced him the money and took the title to the negroes, for the benefit of Powell, so that Powell was to have the negroes when this advance was reimbursed, by him, to Wade. On the 11th April, 1849, the defendant, Wade, entered into an agreement with Jacob S. P. Powell, in respect to these two last lots of negroes, in which the purchase of them by Wade is recited, and Wade agrees to let Powell take possession and have the use of the negroes, he paying interest on the amount then due by him to Wade, which is stated at \$5,800; and whenever all that amount, principal and interest, should be paid, the defendant agreed to deed and settle all of said negroes and their issue and increase, as the said Jacob S. P. Powell should name. Now, it will be observed, up to this time, that the complainant had no title, or claim, either equitable or otherwise, to these negroes, or any part thereof; but, so far as they were concerned, and the rights and debts growing out of the several advances, conveyances and agreement, were all between the defendant Wade and Jacob S. P. Powell. The negroes of Mrs. Powell, mentioned in her father's deed for her use, were not involved in any of these transactions, advances or liabilities.

In January, 1851, defendant and Powell make a new arrangement, in respect to those negroes embraced in the agreement of the 11th of April, 1849, by which that agreement

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was cancelled, and defendant took eleven of the negroes and allowed Powell credit for them, at a price agreed upon between the parties. At that time there appears to have been a full settlement between them, of all matters, Wade allowing Powell credit for all that he had received from him, in every form or shape, and charging him with all advances on account of these negroes, advances made for support of family, purchases made for them, &c., and debts due by Powell to him otherwise; and after deducting from such balance, found then to be due by Powell to Wade, the price agreed upon for the eleven negroes, there was left still a balance due to Wade, the defendant, of \$3,698. As to this balance, and the remaining negroes, Powell and Wade agree, that Powell have the thirteen negroes remaining, stating their names, and if he pays the said sum of \$3,698, then due to Wade, at the times agreed on in the written agreement, that the said negroes shall be Sarah A. Powell's; and if he fails to make any of the payments, Wade to collect the whole amount out of the negroes. This is the first time the name of the complainant is mentioned in connection with these negroes. As to the negroes retained by Wade in that settlement, she never did have any connexion with, in any way whatever, and, therefore, she could not call on the defendant to account as to them, or their hire, and her whole claim or interest in the remaining twelve depended wholly upon the payment to the defendant of the amount due on the negroes of \$3,698; without the payment of that sum, she had no title to the negroes.

On the 4th of November, 1851, the defendant enters into a new agreement, and this time the agreement is directly with the complainant, and Jacob S. P. Powell is a witness, in which it is stated that Wade, the defendant, owns the thirteen negroes mentioned in the last agreement, and he agrees that complainant may work them with the trust negroes, (those she derived from her father,) by paying to defendant \$500 on the 1st of January, 1852, and \$2,700 in five annual installments, the interest to be paid annually—in all \$3,200—and if the said Sarah A. Powell paid said amounts, then the negroes to be hers, as the rest of her property is; if she does not, then the agreement to be null and void, and defendant at liberty to make his money out of the negroes.

The parties subsequently, on the 7th of February, 1853.

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agreed, that Wade would take a tract or settlement of land, in payment of the balance, provided it was delivered to him by the 1st of January, 1854. This was not done, but the land was sold before the time to some one else, and the debt due to Wade on the negroes remained as it was stated in the agreement of the 4th of November, 1851. In addition to this debt, defendant accepted and paid a draft drawn for the benefit of the trust for \$1,012.64. He also bought a note on Jacob S. P. Powell for about \$2,000, for the sum of \$400. These are the state of accounts and dealing between the parties as expressed by their several written agreements, as well as I can state them, at the time the litigation commenced between them. The whole of which, in detail, commencing at the beginning and coming down to the litigation, including all the different suits between the parties and the subject involved, were referred to arbitration "in order to settle the cases and all matters in dispute between the parties," which agreement was made "*as the basis of a compromise of disputes, for the putting an end to litigation.*" And to effect this very desirable object, the defendant waived, for that purpose, all past settlements, brought back all the negroes that he had bought from Powell, and put them into the possession of the arbitrators. The arbitrators selected an umpire, went into an investigation, agreed upon an award, reported it to the Court, and it was made the Judgment of the Court. The complainant filed this Bill to review that award and judgment, and reverse and vacate it on various grounds of alleged error, which I will take up and dispose of in the order they are stated in the bill. Before considering the grounds of error, stated in the bill, I will notice a ground of error that does not appear in the Reporter's statement:

1. The defendant plead the award specially in bar of the complainant's right to relief. That is, that the award so made was not the subject of review by this Court. The Court below, on demurrer to that plea, overruled it; to which defendant excepted. We are clear, that the award and judgment made in this case on this agreement and rule of reference is not the subject of review, unless for fraud, which is not charged in this bill, for the reason that the tribunal that made this judgment or award, was of the appointment of the parties to whom they had referred all matters between themselves, to be determined and settled according to their understanding

of what is right and proper between the litigants. Such a judgment, so made, a Court of Equity has no power to review and correct its errors, if there be any, for the parties have agreed to abide by it. But as it was not necessary to put our judgment in this case on that ground, we did not do so.

2. The first ground of alleged error is, "that the defendant and the Solicitors of the defendant agreed to and did make the reference, without the knowledge, authority, approbation or consent of complainant, and upon a basis unknown to her and at variance with her wishes." This is the charge, and, for the purpose of this motion, must be considered as true. although it is denied by a portion of her Solicitors in the most emphatic terms; and we must say that the charge is a most extraordinary one, when it is understood that some of negroes were taken from her possession and carried to the place where the arbitration was had, for that purpose only, and her husband and, I believe, her son, then at the arbitration as witnesses, and not one word heard at that time by way of objection from her. Be that as it may, we hold that, taking the charge as true, the fact is not such error as will avoid the judgment or award. It is within the scope of a Solicitors' or Attorneys' power and duties to refer the matters in dispute or involved in litigation, which have been confided to their skill and management by their client, to referees or arbitrators, under the sanction and approval of the Court, for adjustment or arbitration, without the consent of his client. *Watson on Awards*, 49. *Caldwell on Awards*, 29 to 38. *Kidd on Awards*, 45 and 46. 1 *Dall.* 642. *McCord Ch. R.* 406. *Billing on Awards*, 52. *Filmer vs. Delmer*, 3d *Taunton*, 486. And why should not this be so? An Attorney may confess a judgment against his client, and this involves every thing.

3. The next error alleged is, that the award was only made upon the separate matters between her husband and the defendant, and did not touch the matters involved in the bill she had filed. This might be so, and no error, for the bill does not show how that fact prejudiced her rights. But it is not so, as the award itself shows. If the defendant had a right or interest that was not fully considered and settled by this award, and most favorably for the complainant, as I shall endeavor to show in the conclusion, we have been unable to find it, and the complainant has not thought proper to point it out.

4. A third error charged is, that James Edmondson was only a next friend, and had no sufficient right or authority to sign and agree to said submission and basis of reference. That he did sign it was not error, but strengthens the act of the Attorney and Solicitors. The joining of the two, we think, made the agreement perfect. We think it a little strange that the complainant should make the violation of his duty and her right, by the next friend, as a ground for setting aside the award; and, to do so, makes her appeal through the same person as next friend. If he committed such gross breach of faith and duty to her, she ought to have withdrawn her confidence.

5. A fourth ground of error is, that the arbitrators exceeded their powers under the rule of reference, by settling their own fees. If this was a good ground, it could only be to that extent—not to vacate the whole award. We do not think it is error. The Statute of the State, providing for these arbitrations, gives to the arbitrators power to settle their fees: and, although this reference was not made under that Statute, we think it a good rule, and ought to be adopted and enforced by the Courts in arbitrations like this, outside of that Statute, as the sense of the law on that subject.

6. The next grounds of error are, that the arbitrators transferred sixteen of her slaves to defendant to pay certain damages or accounts, pretended or real, which the arbitrators found to be due and owing by her husband, Jacob S. P. Powell, individually, to the said defendant, and the same was in violation of the terms in which said negroes, vested in her, that they should not be made subject to the debts of her husband. In making this charge, the complainant gives the names of the negroes and the title under which she holds them, referring to the agreements between the defendant and her husband, and herself, which I have heretofore stated, and making the exhibits a part of the charge. Take the whole charge together and it disproves itself. Not one of the negroes so transferred was the property of the complainant, nor subject to the trust or restrictions contained in the deed from James D. Erwin, her father, to her. On the contrary, the legal title to every one of these negroes was actually in the defendant, and was to continue in him until all the advances made by him for the negroes, of principal and interest, were fully paid off, and in case it was not, that he should

make the money out of the negroes; so that the arbitrators, instead of taking her negroes, only transferred to and vested in the defendant his own negroes, and at prices that were never contemplated when these agreements were made. There was no error in this.

Another ground of error is, that no account was taken by the arbitrators, in the award, of the hire and labor of the negroes of complainant when used by defendant. It would be a sufficient answer to this ground that the bill of review does not state that it was made to appear to the arbitrators that any thing was due to complainant on this account. But we do not choose to meet it in that way. The award shows on its face that credit was given for every dollar of hire due by the defendant, and in such a way that complainant got the benefit of it to her separate use.

7. The next ground is, that the arbitrators allowed to defendant compound interest; how, the bill does not show; but the award shows that the rule of computing interest, adopted by the arbitrators, was that prescribed by Statute—that is, to calculate interest on the principal up to the time a credit is allowed; and if the credit exceeds the interest due up to that time, to add principal and interest together, deduct the credit from the sum total, and add interest on the balance to the next credit, &c.; but when the interest exceeds the credit, the sums were not added, but the interest continued on the balance, until a credit was reached that did exceed all interest, and then addition and deduction were made. This we understand to be the rule of computing interest under the Statute, but this the complainant calls compounding.

8. The next ground of alleged error is, that no copy of the award was furnished to the complainant, or her next friend, as was required by the arbitration act of 1856. To this we reply, that the award was not made under or in accordance with that Act, and is not necessarily to be governed by its provisions, especially in immaterial matters like that.

9. Another ground of error is, that the children of complainant, who are remainder-men in said deed, were not made parties to said award. If they have any interest requiring representation in the matters in controversy, we have not been able to see it.

10. The next and last ground of alleged error is, that the arbitrators examined the defendant and her husband as wit-

nesses in said investigations. We see no error in this. Besides, complainant does not show that either of them testified to any fact that was untrue or prejudicial to her interest.

11. We have thus gone over the whole of the alleged errors, and find that the arbitrators, even judging all their acts by the rules of law, as we would that of a Court, and there has been no error committed that could authorize this Court to review and reverse that judgment. But, looking at the case outside of the strict rules of law, and outside of the necessity and importance of avoiding the mass of litigations that this award effects, and solely with reference to the interests of the complainant, ought this settlement of the controversy to be disturbed? When the defendant accepted the trust, complainant had nothing but the thirty negroes; he has received nothing from her, or her separate property, from that time until the present, except the use of a few of the negroes included in her father's deed, during the years 1849 and 1850, and nothing from any other source, except some \$304 from her husband; which was passed at once to his credit. The defendant, in the meantime, advanced, out of his own means, largely for the support of the family of the complainant; bought and furnished in the same way, with his own means, and when the said Powell owed him largely, for a settlement of land for which he paid some \$2,500; furnished them with every thing in the way of supplies for stocking and carrying on a farm—all of which complainant has now to her separate use; and, in addition to all this, she gets by the settlement some seven or eight negroes added to her separate estate, all growing out of the advances made by defendant, and which he lay out of year after year, paying hire on the negroes for which he held the title, and which he had bought and paid for. And all the defendant gets in the return is simple interest on the advancement. The complainant's separate estate has been largely benefitted, and the defendant gets nothing.

Take another view. Suppose we should vacate the award and send the parties back to settle their rights in the Courts, what would be the result? The title of defendant to the eleven negroes, that he took absolutely from Powell in January, 1851, would be obliged to be sustained: there cannot be a shadow of pretence for setting it aside. Mrs. Powell had not the slightest interest in them nor never had, and as to Powell,

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there could be no excuse for setting it aside by him. Then the charge of the \$3,200, which was admitted to be due by complainant on 1st January, 1852, on the other thirteen negroes, with interest, would necessarily have to be paid out of them, together with the \$1,012, paid by defendant since for this trust. When these charges should be paid out of the thirteen, how many of them would be left? Instead of getting seven or eight, as she has, in all probability she would have fallen in debt. Instead of being injured by this award, the complainant has been largely benefitted. She is the last person to apply to the Court to set it aside. There was no error, and the Judgment of the Court below, overruling the demurrer, must be reversed and the bill dismissed.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in overruling the demurrer to the plaintiff's bill. The Court should have sustained the demurrer, and dismissed the bill.

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1. A demand once barred by the statute of limitations, and afterwards revived by a new promise, cannot be pleaded, at Law, as a set-off to an action commenced during the existence of the statutory bar.
2. The defendant, in an action at Law, cannot plead, as a set-off to plaintiff's demand, a judgment existing against plaintiff, unless defendant had a legal title to that judgment when the action was commenced, even though he may then have had an equitable interest in it.
3. In either case (above specified,) where there are peculiar equities between the parties, such as, that the indebtedness of the defendant at Law was created with reference to his demand against the plaintiff, and with the understanding that they should be included in a future settlement; and that plaintiff at Law is insolvent, Equity will relieve the defendant by enjoining the action, at Law, and taking cognizance of the matters in controversy.

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In Equity, in Troup Superior Court. Decision by Judge BULL, at chambers, on the second day of February, 1860.

Charles S. Lee filed his Bill in Equity, in the Superior Court of Troup county, against Moses Lee, alleging: That in the years 1833 and 1834, and after that time, he paid off for his brother, the said Moses Lee, divers judgments, obtained in the Superior Court, and in the Justice's Court of Greene county, Georgia; that some of the judgments so paid off were obtained against the said Moses Lee alone, and some were obtained against the said Moses Lee, as principal, and the complainant, as security. That the complainant also, at the special instance and request of the said Moses Lee, paid off divers notes, accounts, debts, bank drafts, &c., against the said Moses Lee, on some of which the complainant was security for the said Moses Lee; that these debts, notes, accounts, bank drafts, &c., amounted in the aggregate to the sum of five thousand eight hundred dollars, or about that sum; that, before that time, the said Moses Lee had been largely indebted to the complainant, but the same was discharged in property, delivered by the said Moses Lee to the complainant. That, afterwards, Francis H. Cone and others obtained judgments against the said Moses Lee, amounting to a large sum of money, and caused the executions issued therefrom to be levied on the property so delivered by the said Moses Lee to the complainant, whereby the complainant was compelled to, and did, pay off the judgments to save his property; that said Moses Lee resisted the payment of some of these debts, on the ground that they were gambling debts, but, failing to sustain his defence by proof, judgments were obtained upon them; that, being about to remove from the county of Greene, complainant engaged the Hon. Thomas Stocks to act as his agent in taking up these debts and judgments, and having them transferred to the complainant; that said Moses Lee, being insolvent and unable to discharge the said liabilities, the complainant knew full well that he would have to grant to his brother long indulgence, which he was willing to do. That the said Thomas Stocks paid off and took up, as the agent of complainant, divers judgments and debts against the said Moses Lee, as principal, and the complainant and others, as security, but failed to have the entry of payment by the complainant, as security, made on said

judgments; that said Thomas Stocks took up divers judgments against the said Moses Lee, which were transferred on separate pieces of paper; that the said Stocks, after exhausting the funds left with him by the complainant, for the purpose of paying off said debts and judgments against the said Moses Lee, advanced of his own funds by way of a loan to the complainant (and which the complainant afterwards refunded,) and had some of the judgments transferred to himself, intending such transfer as a memorandum only of the amount so advanced and loaned to complainant, whilst the transfers were really intended for the complainant, and the *fi fas* were accordingly delivered by said Stocks to complainant, but without any written transfer of the same. That said Stocks made out and delivered to the complainant a list of the debts and judgments thus paid by him, as the agent of the complainant, as aforesaid, which the complainant still has in his possession, and which shows the amount to be as herein before alleged; that the said Stocks, in taking the transfers aforesaid, took them of the *fi fas*, whilst it was intended by the parties to be a transfer and assignment of the judgments from which the *fi fas* issued. That complainant kept all these judgments and other liabilities, until the judgments became dormant, having perfect confidence in his said brother, or, at least, not desiring to press him with the law; that after all of the foregoing transactions, to-wit: some time in the year eighteen hundred and forty——, the said Moses Lee was elected Clerk of the Superior Court of Troup county, and held the office for several terms, by means of which he acquired some more money than his immediate wants demanded, and from time to time he advanced to the complainant sums of money for which the complainant gave his due bills; that on or about the third day of February, 1845, for the sake of convenience merely, the complainant aggregated the amounts of said due bills up to that date, and gave his note to the said Moses Lee for twenty-four hundred and eighty-nine dollars and twelve cents cash borrowed, it being intended by complainant and understood between him and the said Moses Lee, that the amount of said note should be applied, on a settlement, to the debts held by the complainant against the said Moses. That the said Moses subsequently intermarried with the daughter of one John H. Broughton, and received from him a considerable amount of

property, which, however, was only a loan by the father to the daughter; that some time thereafter, the wife of the said Moses died, and the said Broughton, who was also the father-in-law of the complainant, brought suit against the said Moses Lee for the property so loaned, and the said Moses, suspecting that the complainant did not take sides with him in said law suit against his father-in-law, became offended, and, whilst the complainant, then being a citizen of the State of Alabama, was on a visit to his said brother, he, the said Moses, deeming (as he said) all the debts held by complainant against him barred by the Statute of Limitations, instituted his action of Debt and Bail against the complainant, returnable to the February Term, 1851, of Troup Inferior Court; that complainant duly filed his answer and pleas to said action, proposing to set-off the aforesaid claims, held by the complainant against the said Moses. That, although the complainant did not, in his plea of set-off, set forth all the debts and judgments taken up and held, as aforesaid, he did set forth more than sufficient to cover the amount of said note, sued on in said action. That, when said cause came on for trial, on the appeal, in the Superior Court of Troup county, the complainant proved the payment of said debts and judgments, as aforesaid, and proved the facts herein before set forth about the transfers, and proved by the said Stocks that the judgments and debts paid off by him, were paid off as agent of complainant, and that they were transferred, as aforesaid, for the reasons aforesaid, and that the judgments and debts really belonged to complainant, and, also, proved by one Edward Broughton, that in the year 1853, after said action was brought, that said Moses admitted to the complainant that he, the complainant, had paid the debts, specified in the amended plea to said action, (a list of which was copied from the list furnished by Stocks, as aforesaid,) amounting to four thousand nine hundred and twenty-seven dollars and thirty-two cents; that it had never been repaid: that it was still due, and he was willing to pay it. That, at the instance of said Moses Lee's counsel, the Judge, presiding at the trial, ruled, that the complainant could not set-off the claims and demands set forth in his pleas at Common Law, but that said demands, if available as a set-off at all, must be made so in a Court of Equity: 1. Because the *judgments* were not transferred, and that if the

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transfer of the *fi fas* also carried with it a transfer of the judgment, yet the transfer being to Thomas Stocks, the legal title thereto was in Stocks, and not in the complainant. 2. Because the proof showed, that the new promise made by said Moses Lee, was made after the suit was commenced, and that, as the claims were barred by the Statute of Limitations at the time the suit was brought, no right of action or set-off existed at that time; that said case was then continued by the Judge to give the complainant an opportunity to file this bill. That the said Moses Lee is sued by the said John H. Broughton for nearly all, or at least for the larger portion of the property in his possession—the suit for which has been once tried and determined against the said Moses, and which is continued only in consequence of an appeal, entered by the said Moses. That said suit in favor of said Broughton is still pending on the appeal, besides which there are large executions against said Moses, one of which is transferred to one Jesse McLendon, for several thousand dollars, and complainant believes and states, that if the said Moses is allowed to prosecute his said action on said note to final judgment, he will force the money due thereon from the complainant, and the complainant will be unable to get the amount due to him by the said Moses, when he obtains judgments thereon, and would thus be defeated and deprived of his just rights. That complainant, being able to prove the facts set forth in his bill, does not ask a discovery from the said Moses, nor does he wish to trust his case and the rights involved therein, to the conscience of the said Moses, if for no other reason, because during the pendency of said action in favor of said Moses against the complainant, *testimony* by *interrogatories* has been actually *manufactured* in every particular, even as to the *witness*, and the *commissioners* and *facts*, and offered as evidence for the plaintiff: That said Moses, when detected, pretended that the testimony was taken by his counsel without his knowledge, but still the said Moses was willing to use it, and when, at one time, it was excluded on the ground that the interrogatories were defectively executed, the said Moses pretended to take them back for re-execution, and being, of course, unable to find either the witness or the commissioners, actually folded up the *old answers* in a new envelope and had them returned as *newly taken*; and that for this and other reasons, complainant, by this bill,

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does not intend to make a witness of the said Moses, a character he has shown so much anxiety to assume.

The complainant prays, in his bill, that the said Moses Lee may be required to account with him; and that the amount of the note sued on by the said Moses Lee may be credited on the sums due the complainant against the said Moses; and that, until the hearing of this case, the said action at Law in favor of the said Moses may be enjoined, and on the hearing be perpetually enjoined, and that the complainant may have a judgment against the said Moses for the balance due him over and above the amount of the note sued on, as aforesaid; and such other relief as the facts and circumstances of his case authorize and require.

Moses Lee set up a demurrer to the bill on the grounds: 1st. That the complainant does not, by his bill, make such a case as entitles him to the relief sought by said bill. 2d. That complainant shows by his said bill, that he has an adequate and ample remedy at Common Law, and does not make such a case as authorizes the interference of a Court of Equity in his behalf; and 3d. That there is no Equity in said bill of complaint.

Upon this state of the case, the presiding Judge passed the following order, to-wit:

"After carefully considering the facts stated in this bill, I am clearly of opinion that they give no jurisdiction to a Court of Equity. The claims of the complainant against the defendant are strictly *legal*, and there is no reason, that I can perceive, why they may not be proven in a Court of Law as well as in Equity. The bill itself disclaims any purpose of discovery from the defendant, and I can see no ground therefore for the interposition of this Court. It is, therefore, ordered, that the demurrer be sustained, and the bill be dismissed; and that this order be entered of record on the Minutes of Troup Superior Court as of the regular Term; the Court having held the decision for further consideration."

To reverse this decision of the Judge, the writ of error in this case is prosecuted.

B. H. HILL, for the plaintiff in error.

BULL & FERRELL, for the defendant in error.

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By the Court.—JENKINS, J., delivering the opinion.

The Judgment of the Court below is placed upon the ground that the complainant's demands are of a strictly legal character, and may be proven as well in a Court of Law as in a Court of Equity. The real question is, whether they may be established, by plea of set-off to the action pending at Law, as well as by a proceeding in Equity, engrafted upon that action. We regard the proposition of the Court below as an affirmation that they may.

There are two classes of these demands, amounting in the aggregate to a large sum, the consideration of which will furnish a test of the correctness of this proposition.

1. These are simple contract debts, barred by the Statute of Limitations at the time defendant commenced his action at Law against complainant, but revived pending that action by a new promise.

The rule, strictly enforced at Law, is, that the right of set-off has reference to the situation of the parties at the time of the commencement of the suit. *9th Geo. Rep.*, 594, *sec. 4*.

The action at Law between these parties was commenced after the bar of the Statute of Limitations had attached to complainant's simple contract demands, and before its removal by the new promise. Consequently, at the commencement of the suit at Law, complainant had no existing cause of action—no right of set-off *quo ad* these simple contract debts.

2. These are judgments against defendant, purchased for complainant by an agent, with the agent's money, (afterwards refunded by complainant,) the agent having in the first place taken an assignment of those judgments to himself, and having neglected, when re-imbursed his advances, to assign them to complainant, though regarding them as complainant's property.

To entitle him to set-off judgments, in an action at Law, the defendant must show, first, That the judgments were in existence at the commencement of the action; and, secondly, That he was either the plaintiff of record, or the assignee *at that time*; in other words, that he had a legal title to the judgments at the commencement of the action. The averment is, that he had, then, only an equitable interest in them. The conclusion is, that he had not, as to this class of demands, an adequate remedy at Law.

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3. Has complainant a remedy in Equity? It is correctly insisted that Equity, in matters of set-off, follows the Law, unless there be peculiar equities between the parties. Such equities will always induce its active interference.

"Courts of Equity will extend the doctrine of set-off, and claims in the nature of set-off, beyond the Law, in all cases where peculiar equities intervene between the parties. These are so various as to admit of no comprehensive enumeration." *2d Story's Equity*, § 1437 *a*.

"Courts of Equity, in virtue of their general jurisdiction, will grant relief in all cases where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded, at the time, upon the existence of some debt, due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge, on both sides, of an existing debt due to one party, and a credit given by the other party, founded on and trusting to such debts as the means of discharging it." *2d Story's Equity*, § 1435.

The averments in the bill, disclose the following peculiar equities between the parties:

1. That complainant interposed for defendant's relief, when he was powerless to meet pressing demands, both parties understanding that complainant, thus becoming the creditor of defendant, must necessarily wait long for repayment.

2. The sums of money, from time to time advanced by defendant to complainant, (being the consideration of the note sued on at Law,) were so advanced, in consequence of defendant's indebtedness to complainant, with the understanding that the note in question was to be cancelled on a future settlement of such previous indebtedness. Indeed, Equity may well regard those advances as partial payments on account of defendant's indebtedness.

3. The insolvency of the defendant, and the utter hopelessness of complainant's demand, unless set-off against defendant's, if not an independent and peculiar Equity, in itself, greatly fortifies the other equities arising between the parties.

4. If the averments in complainant's bill be true, defendant is attempting to perpetrate a fraud, and that attempt it is the province of Equity to thwart.

Believing, therefore, that complainant has no adequate remedy at Law, and that Equity is competent to release him,

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we hold that the Court below erred in sustaining the demurrer and dismissing the bill.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground, that the Court erred in sustaining the demurrer and dismissing the bill, on the ground that the claims of the complainant were of a strictly legal character, and might have been insisted on at Law as well as in Equity.

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1. Pleas of infancy; *non est factum*, and want of consideration in and to the note, or cause of action on which a judgment is rendered, are not proper replies to a suit on the Judgment.
2. A Judgment of a sister State, authenticated according to the Act of Congress, is conclusive on the defendant as to all questions that he could have been heard on in the Court when and before the Judgment was rendered.
3. But the Judgment does not preclude the defendant from pleading any special matter in avoidance of the Judgment, such as fraud in its rendition; want of notice, &c.
4. Being an Attorney in the cause, does not render a witness incompetent, he not having testified to any fact derived from his client, or during the existence and by reason of the relation of client and Attorney.
5. When a new trial is moved for, on the ground of newly discovered evidence, and the facts expected to be proved constituting the newly discovered evidence, are stated in the affidavit of the witness, are strong, and the verdict rather preponderates against the evidences anyhow, a new trial ought to be granted, if the newly discovered evidence would completely turn the scale.
6. When a suit is pending against two, one of whom is entitled to a good defence, and counsel is employed to file that defence, and a judgment is given, subsequently, on the agreement of the plaintiff's counsel, and the other defendant on indulgence to such other defendant, the agreement is a fraud on the other defendant, and does not bind him.
7. When the presiding Judge, in the absence of the party for whom the motion for a new trial is made, has a doubt whether the additional evidence stated.

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is newly discovered, the Court ought to grant the Rule *ni si*, so as to give the party an opportunity to be heard on that subject.

3. When counsel for movant states, in his place, that the evidence is newly discovered, and the affidavit of the witness by whom the new facts are to be proved, states that he had not previously communicated the facts to him, this is sufficient evidence of its being newly discovered to authorize the Court to grant the new trial.

4. The absence of Counsel in attendance on the Legislature, and as a member thereof, is not a good ground of continuance.

Debt on a Judgment in Troup Superior Court. Tried before Judge BULL, at the November Term, 1859.

William R. Morton instituted an action, in the Inferior Court of Troup County, against James Sharman and Clement B. Sharman, composing a firm using the style of James Sharman & Co., to recover the amount of a judgment obtained in the Circuit Court of Russell county, Alabama, in favor of the said Morton against the said defendants.

Clement B. Sharman, being the only defendant served, filed his plea to said action, under oath, alleging that he did not make the note (which was signed James Sharman & Co.,) on which the judgment sued on was founded; and that he never had any notice of said suit, either by acknowledgement of service, or by being served with process by an officer; that at the time said note was given, he was not of lawful age, and only attained his majority on the 28th of July, 1853; and that he never made any promise, either by himself or any one else by his authority, to the said Morton, or any one for him.

The case was carried to the Appeal Docket of the Superior Court of said county, by consent; and when the same was called for trial on the Appeal, B. H. Bigham, Esq., counsel for the defendant, moved to continue the case, on the ground that B. H. Hill, Esq., was the leading counsel of the defendant; that although the said Bigham was first employed and had filed several of the pleas, yet he knew that the defendant looked, almost exclusively, to Mr. Hill to give direction to the case; that, in his absence and without his knowledge, the case had been appealed by consent of Mr. Hill, who had not told him the defence on which he relied; that he felt unprepared to enter upon the defence without the presence of Mr. Hill; that he knew Mr. Hill left

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the Court believing that the case was passed for the term, because just previous to his leaving the Court, he had called his attention to other cases in which they were mutually interested, and the conference closed by a remark that he could then return to Milledgeville, satisfied that none of his business would suffer, as nothing in which he was interested would come up, and that the showing for a continuance was not made for delay, (this being the first term of the case on the Appeal), but to secure the services of Mr. Hill. The presiding Judge qualified this part of the showing by a certificate, that the Court had been informed by Mr. Hill that he should leave that case to be conducted by Mr. Bigbam, as the adverse counsel had refused to continue it, and that the Judge knew that Mr. Hill expected it to be tried; that he had no leave of absence, and that it had been the invariable practice of the Coweta Circuit not to allow the continuance of any cause for absence of counsel, except for Providential cause, or necessary attendance on the Supreme Court, which practice was well known to the Bar of the Circuit. Counsel for the defendant stated, as a further shewing for a continuance, that the answers of Thomas J. Stevens to interrogatories taken out in said case had just been returned by mail, and were defectively executed, and the questions were not fully answered, and that the object of the testimony was to prove that the defendant had no notice of the suit in which the judgment sued on was rendered. Counsel for the plaintiff waived all exception to the execution of the interrogatories, and the presiding Judge, upon examination, deeming the interrogatories fully answered, overruled the motion for a continuance, and ordered the trial to proceed, to which counsel for defendant excepted.

Counsel for the plaintiff then moved to strike out the plea of *non est factum* to the note on which the suit in Alabama was founded, and the plea of infancy at the time the note was made. The Court hold that the pleas were not good as defences (in themselves,) against a judgment, but allowed them to stand as *special pleas of facts* tending to show that the defendant had no legal notice of the suit, or that the judgment was obtained by fraud; and the defendant excepted.

Counsel for defendant proposed to file the plea of *null tiel record*, and also a plea, under oath, denying the partnership between James S. Sharman and the defendant Clement B.

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Sharman. The Court allowed the first plea, but refused the motion to file the other as a legal defence, but allowed it for the same purpose as the pleas of *non est factum* and infancy aforesaid; and the defendant excepted.

Counsel for the plaintiff then offered, in evidence, an exemplification of the record of the suit and judgment in Alabama: to the introduction of which counsel for defendant objected, on the ground that the exemplification was not sufficiently and properly authenticated, the Judge certifying that the attestation was in "proper form," when it should have been, "due form of law"; also, that the exemplification appeared to be mutilated and altered, and incomplete; also, that it showed that service was acknowledged, and proof of the execution of the acknowledgement was not made. The Court overruled the objections and admitted the exemplification: and the defendant excepted.

The plaintiff then closed his case.

The defendant then introduced the following testimony, to-wit:

A certificate made by the Judge of the Probate Court of Russell county, Alabama, stating that, after due and thorough search of the records of his office, he could find no record of any evidence of a partnership between James Sharman and Clement B. Sharman, either by the firm name of James Sharman & Co., or any other firm name.

Also, an exemplification from the records of the Orphan's Court of Chambers county, Alabama, showing that the said Clement B. Sharman was a minor on the 27th of February, 1851, the date of the note on which the suit in Alabama was founded; and also, that he was a minor on the 16th of March, 1852, the date of the acknowledgment of service in said Alabama suit, in which the judgment sued on, in this case, was rendered.

Also, the answers of James Sharman to interrogatories taken out in said case, in which he testifies that the defendant, Clement B. Sharman, was born on the 28th of July, 1832.

The defendant also offered, in evidence, the answer of said James Sharman to one of the interrogatories, which answer was as follows, to-wit: "I heard McCoy, plaintiff's attorney, say that he should not look to Clement B. Sharman for the judgment sued on. I had a conversation with McCoy

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about eighteen months ago, and I never heard of his being disconnected with the case." To this answer, counsel of the plaintiff objected, and the Court ruled out the answer: and defendant excepted.

The defendant also introduced the answers of Robert J. Sharman, John R. Sharman, Richard Thurmond, and Harriet Thurmond, taken by commission, all of whom testified that they are members of the same family of defendant, being his brothers and sister and brother-in-law; and from the family record, the defendant was born the 28th of July, 1832.

The defendant also read the answers of Thomas J. Stevens, to interrogatories, who testified that he knew the hand-writing of James Sharman, but not of the defendant; that he had examined the original records of the suit, in which the judgment sued on was rendered, and service appears to be acknowledged by James Sharman, alone, in his own hand-writing, and that the name of the defendant, Clement B. Sharman, does not appear upon the records of said case, in the acknowledgment of service.

The defendant introduced Joseph Boyd as a witness, who testified that he was acquainted with the hand-writing of the defendant, but is not acquainted with the hand-writing of James Sharman; that he examined, particularly, the papers of file in the Circuit Court of Russell county, Alabama, relative to the case in which the Judgment sued on was rendered, and does not think that the acknowledgment of service in said case is in the hand-writing of Clement B. Sharman. The signature of both names to the acknowledgment of service is in the same hand-writing, being "James Sharman; C. B. Sharman;" that he first knew C. B. Sharman in March, 1852, and knows that he moved from Alabama to Georgia as early as the year 1852, and thinks it may have been as early as March of that year.

John W. McGhee testified: That C. B. Sharman married his daughter, and has resided in Georgia from July, 1852, and was back and forth to his house frequently before that time.

Defendant then closed his testimony.

The plaintiff, in rebuttal, offered in evidence the answers of L. F. McCoy to interrogatories, taken in said case, who testified: That he knew the firm of James Sharman & Co.: it was composed of James Sharman and Clement B. Sharman;

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that he was plaintiff's Attorney in the suit in Alabama, in which the judgment sued on was rendered—that process in said case was served by an acknowledgment of service and waiver of a copy on the back of the writ, to which the defendants signed their names in my presence; that Morton had no other suit against the defendants at that or any other Term of the Circuit Court of Russell county, Alabama, and that he, as Attorney, commenced no other suit in favor of said Morton against said defendants, but did commence other suits against them in favor of Wiley, Banks & Co., and the defendants acknowledged service, as aforesaid; Clement B. Sharman pleaded infancy to said suit in favor of Morton, and that, previous to his filing the plea, the witness did not know that he was a minor, except from rumor; that he was a married man, and a business member of said firm of James Sharman & Co.; witness did not hear that he was a minor until after the acknowledgment of service; that, upon motion to the Court, a guardian *ad-litem* was appointed to defend him; finally, it was agreed by the plaintiff's counsel and the defendants, that a verdict of the Jury should be rendered against them, with a stay of execution for twelve months; that there was no proof of C. B. Sharman's infancy before the Jury, and if he was a minor when the acknowledgment of service was made, the witness did not know it, except from rumor; that the plaintiff paid the witness his fee of one hundred dollars, and his connection with the case ceased, and the plaintiff employed other counsel; the witness has nothing to do with the case, and has no interest in it, except a desire, created by his former connection with the case, to see the plaintiff succeed in getting his money.

Counsel for defendant objected to all of said testimony of McCoy, on the ground that the witness was Attorney for the plaintiff in the case.

The Court overruled the objection and admitted the testimony, and defendant excepted.

It was agreed, that the Code of Alabama should be used as evidence by both parties.

The evidence being closed, the Court charged the Jury, amongst other things:

That, in a suit on a Judgment at Law, whether of this State, or any one of the United States, the plaintiff makes out his case *prima facie* by introducing in evidence a proper-

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ly certified exemplification of the record of the judgment: that it is a general principle, that a judgment is conclusive between the parties to it: that the very object of requiring Courts to keep records of their proceedings, is, that the records may be a perpetual evidence of the facts determined between the parties. When a party has legal notice that a suit is pending against him, either by legal service of a proper officer, or by acknowledgment of service, he is bound to make all his defences before final judgment is had, and if he does not, but slumbers over his rights, he is forever concluded by the judgment: that the Law favors the vigilant, and not the sleeping; that it is the policy of the Law that there should be an end to litigation; so that, if a man is sued upon a note which he never made or authorized to be made—or if he was an infant at the time of the making of the note—or if he have any other legal defence, he must avail himself of it before judgment, or he cannot avail himself of it afterwards. If the note sued on is not his act and deed, he must plead it, and throw upon the plaintiff the burden of proving it; otherwise, if he has legal notice of the suit, and does not make his defence, he can take no advantage of it afterwards. If he is an infant at the time of giving his note, it is his privilege, by himself or guardian, to plead it; but he is not bound to plead it—and if he does not and suffers judgment to go against him, after he is of age, he is forever concluded by it. These are the general rules of Law, but subject, like all other general rules, to various exceptions:

1st. Where the defendant has had no legal notice of the suit against him, either by legal service, acknowledgment of service, or waiver of service, by pleading to the merits of the cause, he is not bound by the judgment—nay, the judgment itself is a nullity, whether the original cause of action be just or not. On the other hand, if he had legal notice, the judgment binds him, and no enquiry is allowable into the merits of the original cause of action.

2d. So, if a judgment is obtained by fraud against a defendant, he is not concluded by it, and may defend himself in a suit on the judgment, by showing, either that there is no such record, or by showing that he had no legal notice, or that it was obtained by fraud. For this purpose, evidence has been admitted upon the questions of infancy and partnership, as circumstances tending to show, either that the party

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had no notice of the suit, or that the judgment was procured against him by fraud, for the evidence contained in the record, of the fact of the defendant's acknowledgment of service, may be rebutted by testimony *ali unde*. If you believe, from the testimony, that the defendant had legal notice of the pendency of this action, and that he became of age before the judgment, unless the judgment was fraudulently obtained, you will find for the plaintiff the amount of the judgment entered up, with interest on the principal sum, at eight per cent., and costs of suit. If, on the contrary, you believe that the defendant was not legally notified of the suit, or that the judgment was procured by the fraudulent contrivances, either of the plaintiff or James Sharman, the co-defendant in the record, you will find for the defendant, with cost of suit.

To this charge, counsel for defendant excepted.

The Jury returned a verdict in favor of the plaintiff, for "One thousand and fifty-one dollars, with interest, at eight per cent., from date of the judgment in Alabama, and cost of suit."

Counsel for the defendant, then, moved for a new trial in said case on the following grounds:

- 1st. Because the Court erred in the decisions herein before stated, as to the pleas of the defendant.
- 2d. Because the Court erred in overruling the objections to the exemplification of the record from Alabama, and admitting the same in evidence.
- 3d. Because the Court erred in sustaining the objections of plaintiff's counsel, to the testimony of James Sharman as to the declarations and sayings of L. F. McCoy.
- 4th. Because the Court erred in overruling the objections of defendant's counsel to the testimony of L. F. McCoy, and in admitting the same.
- 5th. Because the Court erred in charging the Jury as herein before set forth.
- 6th. Because the Court erred in refusing to give the following charge to the Jury, which was requested by the defendant's counsel, to-wit:

That the witness, McCoy, swearing to the filing of a plea in the case, and the exemplification showing none such, and no order to the effect that the plea might be withdrawn, either the record is incomplete, or Mc-

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Coy is incorrect in his statement of facts, and that it will go to the credibility either of the record offered, or of McCoy. If the credibility of the record is impeached, so as to satisfy the Jury that the exemplification tendered is incomplete or mutilated, then the plaintiff has failed to make out his case. If McCoy's credibility is impeached by the conflict, then the Jury are bound to believe the witnesses relative to the acknowledgment of service. If the Jury are satisfied that the note sued on was made when the defendant was a minor, for merchandize, and in trade, that the contract was void, especially if it is not made satisfactorily to appear that he got value for the note. That an infant cannot bind himself in a contract of mercantile partnership, and cannot bind himself by any acknowledgment to a writ for the collection of debts, contracted for such partnership. That no valid judgment can be obtained, at Common Law, against an infant, in Alabama, unless he is defended by a guardian, appointed by the Court, and that even the appearance of an infant in a case does not bind him; the reason being found in the Code of Alabama, and in the fact, that the infant is of tender years, and is not well acquainted with his rights. That, if the Jury are of the opinion, that the paper, produced as an exemplification of the judgment, is imperfect, incomplete, or mutilated, then it does not give sufficient evidence of the judgment, and in that event the plaintiff fails to make out his case. That, if an infant is sued at Common Law, in Alabama, and, pending the litigation, (not being represented by any guardian,) moves away from the State, and afterwards becomes of age, he is not bound to return to the jurisdiction and plead to the suit; and when he does not do so, the judgment does not conclude him.


- 7th. Because the Jury found contrary to the evidence and the charge of the Court.
- 8th. Because the Court erred in overruling the motion to continue the case, made as aforesaid.
- 9th. Because, since the trial of said case, the defendant has ascertained that he can prove by B. H. Baker, that

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in the year 1853 he was employed by James Sharman to defend, particularly for C. B. Sharman, the suit in Alabama, in which the judgment sued on was rendered, on the ground, that the said C. B. Sharman was under age at the time the note sued in said action, in Alabama, was executed; and that a plea to that effect was filed and would have been made available, but for a compromise for indulgence, made by James Sharman; that he was employed by James Sharman, and never saw or conversed with C. B. Sharman in relation to the case; that, to the best recollection of said Baker, C. B. Sharman was not at Court when the case was tried; that he has examined the signatures to the original suit in said case, and is satisfied said signatures are in the hand-writing of James Sharman, and not in that of C. B. Sharman; that he has seen James Sharman write, frequently, and thinks he is acquainted with his hand-writing.

Also, that he can prove by Miles Hill: That, since the trial of this case, he, the said Hill, went to Russell county, Alabama, and examined the records of the Circuit Court, and found thereon cases against James Sharman & Co., in favor of Howard Manufacturing Company, and J. S. & L. Bowie, and Condict & Co., all of which were discontinued as to C. B. Sharman, except the last mentioned case, in which James Sharman was appointed guardian *ad litem* of C. B. Sharman; that, although he did not examine the records with particular reference thereto, yet he saw no plea of infancy, or order for withdrawing such plea, or an order appointing a guardian *ad litem* in the case in favor of Morton; that he looked at the acknowledgment of service and signatures thereto, and both are in the same hand-writing.

Also, that he can prove, by the records of said Circuit Court of Alabama, that there was a contest between the *fi fa* issued from the judgment sued on, and others, for the distribution of two thousand and eighteen dollars and seventy-five cents, in the Sheriff's hands, and that the Court ordered any balance of said sum, after paying off other liens, to be paid to the *fi fa* in favor of Morton; and that he expects to prove



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that there was a balance left, and that it was paid to the Morton *fi fa*.

The facts of this last ground are verified by the affidavits of Miles H. Hill and B. H. Baker, and by the certificate of the Clerk of said Circuit Court of Russell county, Alabama.

The defendant, also, files an affidavit, which was not before the presiding Judge when the motion for a new trial was heard, but which was before him when the Bill of Exceptions in this case was signed and certified, in which affidavit the defendant states:

"That, at the time of the trial, he did not know of the existence of the facts verified by said affidavits and certificate; that he has used all diligence to obtain evidence to establish his defence; that he has been, and sent others, to Russell county, to search for evidence, and that, if he had known that the said evidence was attainable, he would have availed himself of the benefit of it on the trial: that he believes he can obtain evidence in time for another trial of this case, showing that the judgment sued on is invalid and totally void as to him; that he has also learned, by hearsay, and expects to prove, that the record, exemplified and read in evidence in this case, was incomplete, and made so by the agency of L. F. McCoy, the witness who testified against him in this case."

The presiding Judge overruled the motion for a new trial, and this decision constitutes the error complained of in the record.

B. H. HILL & BIGHAM, for the plaintiff in error.

FERRELL & BULL, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

1. This was a suit upon a judgment from the Circuit Court of Alabama. To this suit, the defendant plead infancy at the time of the making of the note; that he did not make the note, and that he was not a partner of the firm of James Sharman & Co., and had no interest in the note which was the subject of that suit. The Court held that these pleas were not proper replies to that action, and we concur with the Court in such ruling. Section 1, of the 4th Article of the

Constitution of the United States, provides, that "Full faith and credit shall be given in each State to the Public Acts, Records, and judicial proceedings of every other State, and that Congress may, by general laws, prescribe the manner in which such Acts, Records, and judicial proceedings shall be proved, and the effect thereof." And Congress, by an Act of 24 May, 1790, (*Cobb*, 275.) having provided for the manner of authentication of such judicial proceedings, and so authenticated, that they "Shall have such faith and credit given to them in every Court within the United States, as they have by Law or usage in the Courts of the State from whence the said Records are or shall be taken."

2. The record of this judgment, having been authenticated according to the Act of Congress, the judgment was as conclusive against the defendant in the Courts of this State, as it would have been in the State of Alabama. If the defendant had notice of that suit, he was concluded as to all questions made by these pleas. *Mills vs. Duryee*, 7 *Cranch*, 481. *Hampton vs. McConnell*. 3 *Wheat.*, 234.

3. The defendant was at liberty to plead any special plea that would have avoided the judgment, such as that he had no notice of the suit, or that it was obtained fraudulently—*Bunniray vs. Stillman*. 4 *Cow. Rep.*, 292—and so the Court below held—

4. The fact, "That the witness was an Attorney for the plaintiff, in the suit in Alabama, in which the judgment was obtained, did not render him incompetent to testify in the cause, and he testified to no fact that he acquired from his client, or during the existence and by reason of the relation of client and Attorney."

5. The newly discovered evidence, on which the defendant asked for a new trial, was very strong. Baker, the witness by whom the facts are expected to be proved, states in his affidavit, that he was employed as an Attorney by James Sharman, the other partner, to file the plea of infancy for this defendant to the suit in Alabama, and that he did file that plea to that suit. That he never saw this defendant, or conversed with him on the subject; that this defendant was not at the Court at which the case was tried, in Alabama. That the plea of infancy, filed by him, would have defeated the suit as to this defendant, but for a compromise, made by James Sharman with the plaintiff, "to give him indulgence."

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If this is true, and the plea was withdrawn, in consequence of the agreement of the plaintiff, to indulge James Sharman, to which this defendant was not a party, this is such a fraud on the defendant as will vitiate that judgment as to him. The judgment was not that of the Court, but of the plaintiff and James Sharman, or rather by their consent. This testimony serves another purpose; that is, to repel or rather explain the presumption arising from this clause of McCoy's answer. "Finally, it was agreed by plaintiff's counsel and the defendants, that a verdict of the Jury should be taken against them, with a stay of the execution of twelve months." Baker's testimony shows that Clement B. Sharman was no party to such agreement, although McCoy's language might have and possibly did create a different impression. The expression, whether accidentally or from design, was rather equivocal.

6. We are rather inclined to the opinion that the verdict is against the weight of the evidence any way. Doubtful, as it was, we think this evidence would have completely turned the scale, had it been in.

7. The only doubt about this ground is, whether the evidence was newly discovered. If the Court below had any doubt on this subject, the rule *nisi* for a new trial ought at least to have been allowed, so as to give the party time to file the additional affidavit.

8. But, we think, the new trial ought to have been granted. The statement of counsel, in his plea, was very strong; this, and the statement of the witness in the affidavit, that he had not communicated these facts to this defendant previously, were sufficient to warrant the Court in the conclusion that the evidence was newly discovered; so a new trial must be granted on this ground.

9. There is one other point, which I omitted to notice in the proper place, and that was the motion to continue, on account of the absence of Mr. Hill, one of the counsel, and the leading counsel, too, of defendant, from the Court, in attendance on the Legislature, as a member thereof. We think, the Court properly overruled the motion. This was not a ground of continuance. Counsel, who have engaged to perform services for a client, to prosecute or defend his suit, must not assume new duties and relations inconsistent with the duty growing out of such engagement, and should he do so, the client must get new counsel, or do without him; his

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absence in attendance upon his new duties will not work a continuance of the cause; such has not been the practice of the Courts within our knowledge.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in refusing the motion for a new trial. The Court should have granted a new trial on account of the newly discovered evidence.

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It is an extreme case, which will justify the Court in dismissing the plaintiff's case for not answering interrogatories, filed by defendant under the Acts of 1847 and 1850—especially where service has been made on counsel only—the party having removed beyond the jurisdiction of the State, and to parts unknown, before the filing of the interrogatories. It would be better, generally, in the first instance, to propose terms less stringent.

Trover and Bail, in Meriwether Superior Court. Decision by Judge BULL, at the August Term, 1859.

Edward J. Dawson instituted his action of Trover and Bail against James Callaway, for the recovery of four negro slaves. The action was made returnable to the February Term, 1849, of Meriwether Superior Court. To this action, the defendant filed his pleas of the general issue, and the Statute of Limitations. On the 24th of March, 1858, the defendant's counsel filed in the Clerk's office the following "interrogatories to be exhibited to the plaintiff in said case, who resides without the limits of the county of Meriwether, from whom the defendant wishes a discovery, on oath, of material facts, to be read on the trial of said case, so as to enable him to successfully defend the same."

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"Interrogatory 1st. Have you not conveyed all your interest in the property sued for in said action of Trover, and to whom did you convey it? Please state the time you made the conveyance, and the consideration for which you made it? Did you not convey all your interest in said negroes, before the suit was instituted against the defendant, and at what place did you make it, in what county, and in what house? Have you not stated, to divers persons, that you had no interest in said suit, and to whom have you so stated? If you state you have conveyed all your interest in said negroes, was that conveyance in writing or not? If you did not convey all your interest in the negroes sued for, what portion did you convey, and what portion did you reserve to yourself?"

Accompanying these interrogatories, there was a notice to the plaintiff, that they were filed in the Clerk's office, "in accordance with the provisions of the Statute in such cases made and provided, and that the answers of the plaintiff to said interrogatories would be required at the next Term of said Superior Court, to be used on the trial of said cause on the part of the defendant." Service of the interrogatories and notice was acknowledged, and copy and further notice waived, by Messrs. Adams & Knight, who signed the acknowledgment and waiver, as "Attorneys for plaintiff."

At the August Term, 1858, the Court passed the following order in said case:

"It appearing to the Court that interrogatories have been filed in the Clerk's office, addressed to the plaintiff in said case, which were served, on the 18th day of March, 1858: It is, therefore, ordered, that the plaintiff answer said interrogatories by the next Term of this Court, or said case be dismissed."

The plaintiff, by order of the Court, acknowledged service of the interrogatories, the acknowledgment and service to take effect from the 26th of February, 1859. This acknowledgment was signed by B. H. Hill, plaintiff's Attorney.

At the February Term, 1859, the following rule was taken, and served in said case, to-wit:

"It appearing to the Court, that, at the last August Term of this Court, an order was had and entered on the Minutes of this Court, requiring said plaintiff to answer interrogatories filed in said cause, by the present Term, or that said case be

dismissed, and said plaintiff, suggesting to the Court said order, was improvidently granted, and should be rescinded for the following reasons, to-wit:

1. Because said order was granted after said cause had been disposed of for that Term, and without notice to the counsel of plaintiff, and after they had left the Court.

2. Because said order was not procured by a rule *nisi*, and plaintiff's counsel were not called on to show cause against the granting of said order.

3. Because a copy of said interrogatories had not been served on the plaintiff or his counsel, and had only been served upon Messrs. Adams and Knight, with notice that they were not counsel for the said plaintiff.

4. Because the continuances in said case, not having been exhausted, said order was premature.

5. Because said order, in the then state of the case, could only be passed by the consent of said plaintiff, or his counsel, which assent had not been obtained at the passage thereof:

"It is, therefore, on motion of plaintiff's counsel, ordered, that the defendant show cause, so soon as counsel can be heard, why said order should not be set aside, and annulled, on the grounds aforesaid."

On the hearing of said rule *nisi*, the Court ordered and adjudged, "That the rule *nisi* be made absolute, and that the case be continued by the plaintiff, and that the plaintiff answer the interrogatories direct, and cross, within ninety days after Court, and on failure so to do, to shew cause, at the next Term of this Court, why said case should not be dismissed."

In answer to this order and rule *nisi*, and for cause why said case should not be dismissed, B. Hill and B. H. Hill, counsel for the plaintiff, showed the following, (the facts recited in the showing not being denied):

1st. The interrogatories sued out for the plaintiff by the defendant, and calling on him to answer, whether he had not, since the commencement of said suit, transferred and assigned his interest therein, and to whom he had so assigned his interest, and requiring no other or further answer of any matter, or thing, touching said case, are wholly irrelevant to the issue in said case, and the defendant does not claim or pretend that he is the purchaser of any such interest, or that he

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derives any claim or title to the property, from any one being such purchaser, and the plaintiff, therefore, by his counsel, demurs to said interrogatories, and now moves to suppress and set them aside for the reasons aforesaid.

2d. Said cause should not be dismissed, because the said plaintiff's continuances are not exhausted, he never having had but one continuance, since said cause came back from the Supreme Court, and a new trial granted therein.

3d. And for further cause, and in order to show that the said plaintiff is not in contempt for not answering the said interrogatories, B. Hill, of counsel for plaintiff, states in his place professionally, that, at the time said suit was commenced, the plaintiff resided near the line of Meriwether and Talbot counties, in the latter county, and the said B. Hill, and E. H. Worrill, Esq., were his Attorneys in bringing said suit and prosecuting the same; that, when said Worrill was promoted to the Bench, B. H. Hill took his place in the case; that, before this time, the plaintiff removed to the State of Mississippi, and after such removal, corresponded, as respondent believes, mostly with the said Worrill; that, about two years ago, respondent received a letter from the plaintiff, inquiring about the progress of said cause, but has never since received any other; that respondent was never informed or knew, until the last February Term of this Court, that the defendant desired to have the testimony of the plaintiff in said case; that shortly after the said last Term, and as soon as respondent obtained a copy of the interrogatories (or it may have been the original,) and having mislaid the plaintiff's letter, he applied to said Worrill to communicate with the plaintiff and get his answers to said interrogatories, which he promised to do; that respondent has since been informed by said Worrill, and believes it to be true, that since the last Term of this Court, he, Worrill, wrote to the Postmaster, at the former residence of the plaintiff, in Mississippi, and was informed that the plaintiff had removed to the neighborhood of Pontotoc, in North Mississippi, and that said Worrill corresponded with the Postmaster at Pontotoc, and has since ascertained that that is not the plaintiff's Post Office or residence, and that said Worrill, nor respondent, has not been able to ascertain the present Post Office of the plaintiff, so as to communicate with him; that respondent was about to send a special messenger to the State of Mississippi for the

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answers of the plaintiff, and if it should be determined that said answers are material, respondent expects to be able to procure said answers by the next Term of this Court. That respondent is satisfied that the plaintiff has no knowledge that said interrogatories are filed, and that on being notified of the same, he will promptly answer, and, as before stated, if said answers are adjudged material, respondent, as counsel of the plaintiff, expects to procure the same."

Upon hearing and considering this showing, the presiding Judge overruled the same, and dismissed the said case.

The plaintiff excepted to this decision of the Judge, and prosecutes the writ of error in this case, to reverse that decision.

B. H. HILL, for the plaintiff in error.


DOUGHERTY, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

This was an action of Trover, brought by Edward J. Dawson to recover of James Callaway four slaves.

In the progress of the case, interrogatories were filed by the defendant, to prove by the plaintiff that before, or since the commencement of the action, (there is some discrepancy in the record upon this point,) that he, Dawson, had parted with the title of the property. Service was acknowledged on the interrogatories on the 18th of March, 1858, by Adams and Knight, as plaintiff's Attorneys. At the August Term thereafter, an order was taken, by the defendant's counsel, that the interrogatories be answered by the next Term of the Court, or that the case be dismissed.

At the next Term of the Court, which was in February, 1859, the plaintiff moved to set aside the order of the preceding Term, as having been improvidently granted, on various grounds, which were set forth in the rule. The Court sustained the motion, vacated the order of August, 1858, but directed the counsel of plaintiff to acknowledge service then on the interrogatories, which was done. It was further ordered, that the interrogatories be answered within ninety days, or, on failure to do so, to show cause, at the next Term of the Court, why the case should not be dismissed.



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At that Term, the interrogatories being still unanswered, counsel for plaintiff showed for cause, why the case should not be dismissed: 1st. Because the testimony, if obtained, was not pertinent; 2d. That the plaintiff's continuances had not been exhausted, and until they were, he had the right to retain his case in Court, in order to obtain the testimony, if possible; 3d. Because he had exercised due diligence to procure the testimony.

The showing, being deemed insufficient by the Court, was overruled, and the case dismissed; and this is the decision excepted to.

Four Acts have been passed by the Legislature, authorizing discovery to be had at Common Law. That is, to allow either party to make his adversary a witness in the cause. The first was in 1847 (*Cobb*, 465.) By the terms of that Act, interrogatories were to be filed for the party, plaintiff or defendant; and if the Court was satisfied that the interrogatories were material and pertinent, and such as the adverse party would be bound to answer on a Bill for Discovery in a Court of Chancery, the same were to be allowed, and an order passed requiring an answer in sixty days, and upon failure to answer fully, the Court had the right to attach the party as for a contempt, dismiss his case, if plaintiff, or strike out his defence, if defendant, and award judgment as in case of default; *or pass such other order, as might, in the discretion of the Court, be deemed just and proper.*

The Act of 1850, amendatory of the Act of 1847, (*Cobb*, 466) provides, that the order for taking the answer of the party, might be obtained in vacation as well as Term time. The fourth section of the Act of 1850 declares that, when it shall be made to appear to the Court that the time allowed for the answer to the interrogatories to come in, shall, from any cause, not be sufficient, the Court may allow such further time as the circumstances of the case may require. And it is worthy of remark, that by this Act, service was authorized to be made on the counsel of the absent party, which was done in this case—the plaintiff himself having left the country previously.

I forbear to comment on the Acts of 1854 (*Pamphlet*, p. 50) and of 1857 (*Pamphlet*, p. 56,) both amendatory of the Act of 1847. It is quite apparent, in this case, that the interrogatories were filed under the Acts of 1847 and 1850.

Dawson vs. Callaway.

If this be not so, then the defendant is wholly at fault, for, under the Acts of 1854 and 1857, it was his duty to sue out a commission and have the testimony of the plaintiff taken, and he has not taken the first step for that purpose. The interrogatories quietly repose in the Clerk's office, where they were deposited by the defendant, or his counsel. It will be well for counsel to scrutinize these different Statutes carefully. The Acts of 1847 and 1850 are similar, as were the Acts of 1854 and 1857; but the two first are wholly unlike the two last.

We do not deem it necessary to examine very critically whether the orders passed by the Court were in strict conformity with the Acts of 1847 and 1850, and conceding that the interrogatories were material and pertinent, still the question recurs—was the Court right in dismissing the case? It will be remembered that the plaintiff never has been served personally with these interrogatories. For ought that appears, he has no notice of them. His counsel have been making diligent inquiry to ascertain his residence, but have hitherto failed. Was this a Bill in Chancery for Discovery, and the same diligence had been used to find the defendant to obtain his answer, would the Court allow the Bill to be taken *pro confesso*? We think not; and yet that formality would fall far short of dismissing the action. Why not have put the plaintiff upon terms, as the Court was authorized to do by the Statute, either to concede the transfer of the title to the property in controversy, or have the action dismissed? This would have been more equitable and proper.

We think, the rule administered by the Court was too rigid, and that the time should have been enlarged, so as to have enabled counsel to have procured the answers of Dawson.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in dismissing the plaintiff's case.

 Kelly & Mitchell vs. Morris *et al.*

 KELLY & MITCHELL vs. MORRIS *et al.*

- Equity will not, by injunction *pendente lite*, restrain a party in possession of property, purchased from one in *præcable possession*, under a Sheriff's sale. in the use and enjoyment of that property, at the suit of a purchaser of the same property, from another, claiming adversely to the first vendor; complainant and defendant, each having been ignorant, at the time of his purchase, of any title adverse to that of his vendor.

In Equity, in Fulton Superior Court. Decided by Judge BULL, at the October Term, 1859.

Alexander Kelly and Pleasant A. Mitchell, prepared and presented to His Honor Orville A. Bull, the presiding Judge of the Coweta Circuit, their Bill in Equity, in which they alleged: That in the year 1852, the Augusta, Atlanta and Nashville Magnetic Telegraph Company was incorporated by Acts of the Legislatures of Georgia and Tennessee, and clothed by said Acts of incorporation with power to construct a Telegraph line from Augusta, in the State of Georgia, via Atlanta, to the city of Nashville, in the State of Tennessee; that after said Company was organized, it went on to construct said Telegraph line, and, at great expense, completed the same in the year 1855; that the necessary expenditures for its construction were so heavy, as to exhaust all the money paid in by the subscribers and stockholders, and still leave the Company in debt; that in order to raise funds to put the line in good order, and to pay off the indebtedness against it, a meeting of the stockholders was held on the 17th of October, 1854, at which it was resolved that Enoch R. Mills, the President of said Company, be authorized to borrow money for the use and benefit of said Company, and to execute a mortgage or mortgages upon said Telegraph line, to secure the payment of the sum so borrowed; that, pursuant to the authority of said resolution, the said President, Enoch R. Mills, did borrow from Samuel Clark the sum of three hundred and sixty dollars, and from William Pybus the sum of twenty-five hundred dollars, and from Samuel Scott the sum of three hundred and seventy-five dollars, and executed mortgages to the said persons upon the said Telegraph line and its appurtenances, to secure the payment of said sums of money; that said Company failing to pay the said sums of money at

the time the same was due and payable, the said mortgages were, upon application of the mortgagees, foreclosed by a decree of the Court of Chancery, of the county of Davidson, city of Nashville, and State of Tennessee, at the November term, in the year 1856, and by said decree, the said Telegraph line and appurtenances, including the wire, posts, insulators, office furniture, and twenty-five telegraph instruments at the different offices of said Company, and the right of way, both in Georgia and Tennessee, were all ordered to be sold; and in pursuance of said order and decree, the same were sold on the 30th day of August, 1856, in the city of Nashville, at public out-cry, to the highest bidder, at which sale James Kelly and William Kelly became the purchasers, at the price of thirty-five hundred and eighty-five dollars, they being the best and highest bidders. That by agreement between the plaintiffs in said decree and the said purchasers, the said plaintiffs sold to the said James and William Kelly all their interest in said decree, and the same was transferred upon the execution docket of said Court, the said Kellys assuming to pay the costs of the proceedings in said cases; that by a further decree of said Court, the title of the Augusta, Atlanta and Nashville Magnetic Telegraph Company, to all the property of said Company in the States of Tennessee and Georgia, to-wit: the wires on said line, the posts and insulators, the office furniture and twenty-five telegraph instruments at the different offices, and the right of way aforesaid, was divested out of said Company and vested in the said James and William J. Kelly; that Alvin D. Hammett, of the county of Cherokee, and John H. Glover, then of the county of Cobb, in said State of Georgia, but since deceased, both of whom were Stockholders in said Company, and represented themselves as holding large claims against said Company, some of which had been reduced to judgment, were both present on the day of the sale aforesaid, or said Hammett was present at said sale, representing himself and said Glover, and then and there assented to the same, and agreed with the said James and William J. Kelly, that they, the said Kellys, should become the purchasers of said property at said sale, and take the same, discharged and free from any lien, which they, the said Hammett and Glover, might have on the said property by virtue of said judgment, or otherwise, and that they would take mortgages from the said Kel-

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lys upon that part of the property of said Company within the State of Georgia, to secure them in the payment of their said claims: that, in accordance with such agreement, the said Kellys did become the purchasers at said sale, and did execute to said Hammett and Glover mortgages, as aforesaid, to secure them in their claims aforesaid, all of said claims being then and there added up and included in two notes, given therefor by one Charles C. Clute—the note payable to said Glover being for the sum of eight hundred and fifty-five dollars and fifty cents, and the one payable to said Hammett being for thirteen hundred and sixty dollars and seventy-five cents: that, by virtue of the agreement and the execution of the notes and mortgages to said Glover and Hammett, as aforesaid, all the said property of said Company became vested in the said Kellys, discharged and free from any lien which might previously have existed against the same; that on the 10th of May, 1859, the said James Kelly and William Kelly, by their Attorney in fact, Enoch R. Mills, sold and conveyed to the complainants all that portion of said Telegraph line and property within the State of Georgia, to-wit: the wire, posts, insulators, office furniture and instruments in each office, and the right of way or franchise of said Company for and in consideration of five thousand dollars, paid therefore by complainants, being a full and fair price for the same: that said sale and conveyance, by the Kellys, to complainants, was by written deed, by virtue of which complainants became the lawful owners and proprietors of the said property so conveyed, and as such were entitled to the profits arising therefrom: that complainants are informed and believe, that the said Alvin D. Hammett, and one Edmund J. Camp, of the county of Cobb, did, in the latter part of the year 1858, or the first of the year 1859, for the purpose of practicing a fraud upon the *bona fide* owners of said Telegraph line, procure the same to be levied on, by virtue of sundry *fifas*, which, as complainants have been informed and believe, had been obtained and were in the possession of, and under the control of the said Hammett at the time of the sale of the said Telegraph line, and other property of the said Company, at the city of Nashville, under the decree aforesaid, and that said *fifas* were included in the settlement, made at the time of said sale, and as complainants are informed and believe, and charge were kept open,

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fraudulently, by said Hammett; that said Telegraph line and appurtenances, or a part thereof, was sold under said *fifas*, at Sheriff's sale, in several counties in the State of Georgia, and bought by said Hammett at a very small and inadequate price, by virtue of which purchase said Hammett assumed to be the true owner and proprietor of said line and property, and took possession of the same, well knowing that all the title to said property had been divested out of said Company, and vested in the said Kellys; that the complainants have been informed, and believe, that said Hammett has but recently sold all that part of said Telegraph line, with its appurtenances, within the State of Georgia, to a company of gentlemen residing in Lynchburg, and State of Virginia, and has given them the possession thereof; that said Company consists, as complainants are informed, and believe, of the following persons, to-wit: Dr. William S. Morris, Crenshaw, John S. Langhorn and Charles Scott, who, after receiving possession of said line and property, delivered the possession of the same to Charles T. Campbell, of the county of Fulton, Augustus W. York, of the county of Cobb, and C. W. Presley, of the county of Cass, in said State of Georgia, and that said Campbell, York and Presley are now using and working said line, and all its equipments and appurtenances, and receiving the profits of the same, and appropriating said profits to their own use, or to the use of the said Morris and his said associates, refusing to the complainants any and all control of said line and its fixtures, or any part of the profits thereof, which profits are of the monthly value of two hundred dollars, or other large sum; that the portion of the Telegraph line and fixtures so used and controlled by the said Campbell, York and Presley, is worth the sum of two thousand dollars, or other large sum, of all which the complainants are deprived by the fraudulent conduct of the said Hammett and his confederates; that said sale, by Hammett to Morris and his associates, was made for the purpose of carrying out the fraud, and to make it more difficult for complainants, to ferret out the same, and obtain their rights; that said Campbell, York and Presley are men of very slender means, and wholly unable to answer to the complainants, in damages for the injuries which they have sustained and may yet sustain in the premises.

The bill prays a discovery as to the facts; an accounting

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as to the profits of the Telegraph line and fixtures ; an injunction restraining further use of the line ; and for general relief.

When the bill was presented to Judge Bull for his sanction, he granted a rule *nisi*, calling upon the defendants to shew cause, on the second day of the October Term, 1859, of Fulton Superior Court, or so soon thereafter as counsel could be heard, why the injunction prayed for in the bill should not be granted.

At the time and place set apart for the hearing, the defendants appeared, and for cause, why the injunction should not be granted, shewed :

First. The obligation and contract entered into by said Hammett with Clute, at the time of the sale in Nashville, Tennessee, showing that Hammett bound himself to transfer, assign and control the *fi fas*, then owned by Hammett, to Clute so soon as Clute should pay all the notes which he then gave, as they become due.

Second. The affidavit of Alvin D. Hammett to the same effect, and also, that Clute had never paid one cent on the note, although all of them had long since become due, and were due when the Telegraph Line in Georgia was levied on by virtue of Hammett's *fi fa* ; that Clute is insolvent, and had gone to parts unknown, and that neither of the Kellys had ever paid anything on the notes, but refused to do so on application of Hammett's Attorney, who went to Tennessee for the purpose of collecting the money ; that his said Attorney returned from Tennessee, and reported (as he believed, truly,) that the said Kellys were also insolvent, and did not expect to pay anything, either on their own, or Clute's indebtedness to said Hammett.

Third. That, according to the case made by the bill, the complainants have no title to the Telegraph line, because the Chancery Court of the State of Tennessee had no jurisdiction to decree a sale of the line in Georgia, nor did the Master, or Commissioner, or Sheriff, of Tennessee, have any authority, or power, to sell, in Tennessee, the line and fixtures in Georgia.

Fourth. That William S. Morris and his associates have the legal title to said Telegraph line, being *bona fide* purchasers for a valuable consideration without fraud or notice of fraud.

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Upon the hearing, the presiding Judge discharged the rule *nisi*, and refused the injunction, and it is to reverse this decision that this writ of error is prosecuted.

EZZARD & COLLIER, for the plaintiffs in error.

IRWIN & LESTER, for the defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

The first error assigned against the Judgment of the Court below, is, that "That the Court erred in deciding that the purchaser, at a sale made under a decree of a Court of Chancery, upon a bill filed in the State of Tennessee, for the purpose of foreclosing a mortgage upon the whole Telegraph line and fixtures, furniture, &c., acquired no title to that portion of the said property lying in the State of Georgia."

This is an objection to the jurisdiction of the Court of Chancery in Tennessee. This point is not free from difficulty, arising chiefly from the meager statement of facts in the transcript.

Unwilling to decide so important a question upon insufficient knowledge of the facts involved, and, finding that the other question, raised by the defendants, in the Court below, as cause shown against the granting of the injunction prayed, must control our judgment, we pass at once to its consideration ;

The only other error assigned, is, that "The Court below erred in refusing to grant said injunction upon the facts stated in said bill, and the evidence exhibited." This brings us to the consideration of the case upon its merits, as made in the bill, and we give the plaintiffs in error the benefit (for the purposes of the argument) of a concession of jurisdiction in the Court of Chancery in Tennessee. Plaintiffs in error claim under J. and W. J. Kelly, who purchased at a sale made under a decree of that Court. Defendants in error hold, under Hammett, who purchased, at Sheriff's sales, in the several counties in Georgia, through which the telegraphic line passes, and in which the "fixtures, furniture," &c., were found ; these sales having been made under certain Common Law judgments, obtained in Georgia, against the original Company, in favor of Hammett and Glover, older than the

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mortgage liens, under which J. and W. J. Kelly purchased, and of which Georgia judgments J. and W. J. Kelly had notice at the time of their purchase. Plaintiffs in error predicate their claim for relief, upon the averment of fraud, committed by Hammett (representing Glover as well as himself.) The averment is, that Hammett, being present at the sale under the decree in Tennessee, entered into an agreement with J. and W. J. Kelly, for himself and Glover, anterior to the sale, by which he bound them to accept in lieu of their judgment liens, the notes of one Clute, secured by mortgages of J. and W. J. Kelly, of so much of said Telegraph line and other property as were in the State of Georgia, which notes and mortgages were actually given, and accepted by Hammett. They further allege, that the subsequent sale of the property within the State of Georgia, under these identical judgments, was fraudulent and void as against themselves, who were innocent purchasers, without notice of these judgments. The defendants, in the Court below, incorporated in their response to the rule *nisi*, requiring them to shew cause why an injunction should not be granted, the affidavit of Hammett (who was not a party to the bill,) negating this averment, and alleging, that by the agreement, entered into at the time of the sale in Tennessee, aforesaid, he bound himself to transfer his judgment and *fi fa* to Clute, upon the payment, by Clute, of his notes so given—and he appends to his affidavit a copy of his said agreement. Further, he states, that, at the time of the maturity of Clute's notes, he was insolvent and had absconded without having paid any portion of them; that, after waiting a considerable time, he sent a special messenger to the Messrs. Kelly, to demand payment of Clute's notes, that they declared themselves unable to pay the notes, and did not expect to do so at any time—whereupon he, Hammett, proceeded to levy upon, and sell the property lying in Georgia. This affidavit and agreement were before the Court below, as a part of defendants' response to the rule *nisi*, and came before this Court in the transcript of the record.

There is something mysterious in Clute's connection with the negotiation in Tennessee; but J. and W. J. Kelly, under whom plaintiffs claim, must have understood and adopted that connection, whatever it may have been. We must suppose them to have been cognizant at the time of Hammett's

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obligation to transfer those fi fas and judgments to Olute, upon the payment of his notes—and this is wholly incompatible with plaintiffs' averment, that by the negotiation in Tennessee the judgments were considered satisfied, and were fraudulently kept open, and used subsequently. J. and W. J. Kelly, under such a showing, would not have been entitled to the relief asked, and the plaintiffs in error can be in no better condition. Defendants shewing upon this point was abundantly sufficient. It is insisted, however, that the sale by Hammett to defendants was intended to consummate and cover up his fraud, and that plaintiffs in error, being innocent purchasers, without notice of these judgments, are entitled to protection. There are several answers to this view:

1. As already shown, the response to the rule *nisi* removes the imputation of fraud from Hammett, in the original transaction; and there was, therefore, no fraud to be averred or consummated by the sale to defendants.

2. Although the chronological order of the events, narrated by plaintiffs in their bill, is not very clear, we are constrained to infer from their statements that this property had been sold in Georgia by the Sheriff, and purchased by Hammett, and had passed legally and peaceably into his possession, before plaintiffs purchased from J. and W. J. Kelly. The fact, then, that these vendors were not in possession of the property sold, was sufficient notice to put them on the alert, to stimulate them to diligent inquiry into these vendors' title.

3. The bill does not charge upon the defendants either participation in the alleged fraud, or knowledge of it, as charged to have been practiced by Hammett. It charges fraud, and knowledge of fraud, upon no person, except Hammett, who is no party to the cause. Its allegation is that the defendants purchased from Hammett, then in peaceable possession, under a purchase at Sheriff's sale.

We think the position of defendants decidedly better in every point of view than that of plaintiffs' in error—but if equal *only*, in other respects, by plaintiffs' own showing, it is better in this, that defendants are in possession fairly and legally acquired. The Court below was, therefore, right in refusing the injunction.



Hobgood *vs.* Martin.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

HOBGOOD *vs.* MARTIN.

1. Although the Court, in decreeing a settlement on the wife, duly attends to the interests of the children, and gives them an interest in the property, (provided the wife's estate therein does not cease at her death); yet it does so only on the assumption, that the wife is anxious to provide for her children.
2. Children have no independent equity of their own—their claim to the consideration of the Court is capable of being either expressly given up by the wife, or tacitly waived by her death without having asserted it.
3. The right of the children attaches on the wife's instituting proceedings for a settlement; and, therefore, if she should die, while such are pending, without expressly waiving her right, the children are permitted to enforce their claim by a Supplemental Bill:

In Equity, in Fayette Superior Court. Decision by Judge BULL, on the 11th of May, 1860.

This case came up, and was heard, upon the following state of facts, as shown by the record, to-wit;

Mary Ann Gausden, by her next friend, Jackson Martin, filed a Bill in Equity, in Fayette Superior Court, in which she alleged: that she was a *feme covert*, being the lawful wife of Jackson C. W. Gausden, and that, on the twentieth day of December, 1832, one Wright Martin, the father of the complainant, made and published his last will and testament, by which he gave to each of his children, and to his wife, Nancy Martin, during her natural life, an equal share of his estate, and appointed his said wife executrix, and one Ephraim Pennington executor of his said will; that shortly after making said will, the said testator departed this life,

leaving said wife and eight children heirs and distributees of his estate; that said estate was kept together, by the said executrix, for many years after the testator's death, and until about the year 18—, when said executrix departed this life, leaving the property of said estate, with its increase, remaining in kind; that after the death of the executrix, and after the said Pennington had been removed from his office of executor, James L. Hobgood and Jesse L. Blalock applied for and obtained letters of administration *de bonis non*, with the will annexed, so far as the personal property of said estate was concerned, and also letters of administration so far as the real property of said estate was concerned, as the will did not convey the land, for want of the requisite number of witnesses; that before he had taken any other step in the said administration, the said Blalock was elected Ordinary of said county, and his letters abated, leaving the whole estate in the hands of the said Hobgood, where it still remains, except such portions as may have been advanced and paid out to the creditors and legatees of said estate; that said Hobgood now has in his hands the sum of five thousand dollars, or other large sum, belonging to said estate, arising from the sale of the real and personal estate, and the hire of negroes, to one-eighth part of which the complainant is entitled under said will, and to one-seventh part of which she is entitled, if Samuel Martin, one of the children of the testator, who has died without leaving wife, child or children, and without a will, received, by way of advancement, an amount sufficient to cover the share to which he is entitled under said will; that on the 3d and 5th days of May, 1854, the heirs of said estate, being all of full age, according to the terms of a written agreement, divided all the negroes of said estate, except one negro woman, by the name of ———, born on the last day of the division: that, by said agreement, one share of said estate was to be left in the hands of the administrator, as the part to which Samuel Martin is entitled, unless advanced sufficient to cover his share, and that neither share was to be considered as delivered, or the assent of the administrator as given until receipts were passed; that said administrator still holds and retains possession of the part and share to which complainant is entitled, consisting, as she is informed, of one negro man by the name of Randall, about 40 years of age; Fady, a woman about 30 years of

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age; Jim, a boy about 6 years of age; Frances, a girl about 6 years of age, and William, an infant child; that said, negroes are still in the possession of the said administrator and have never been, in any way or manner, reduced to possession by the husband of complainant; that the said share of said estate to which the complainant is entitled, is all the property or means she or her husband has to support, maintain and educate their two children; that her said husband, with whom she is now living, is hopelessly insolvent, and is the unfortunate victim of intemperance, which causes him to lead an idle, immoral and profligate course of life, and makes him the easy dupe of designing persons, who complainant believes will get from him, without consideration, all of said property, if he is allowed to acquire title thereto, by reducing the same to possession, and that complainant will thus be left without the means of support, and be deprived of the means of supporting, maintaining and educating her said children; that said share of complainant is now in the hands of said administrator, free from all incumbrance, and subject to be turned over to such person as the Chancellor may appoint to receive the same, in trust for the benefit and support of the complainant and her family; for which purpose she filed said bill.

The complainant prays, by her bill, the defendant's answer as to the facts; and that he may account for her full share of said estate, and deliver the same to a trustee to be appointed by the Chancellor, to be, by such trustee, held and appropriated to the sole and separate use and benefit of the complainant and her children; and that her husband may be enjoined from receiving said property, or, in any way, reducing it to possession; and for general relief.

Pending this bill, and before any decree, either interlocutory or final, was passed or rendered therein, the complainant died, leaving three children, to-wit: Nancy Jane Gausden, William H. Gausden, and Camilla Gausden, of whose persons and property Jackson Martin applied for and obtained letters of guardianship, and, as guardian of said minor children, filed his bill in Equity, in Fayette Superior Court, alleging the facts contained in the former bill of the said Mary Ann Gausden, and that she had died without reducing said property to possession, and that her said husband had not reduced the same to possession, and that he had obtained

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the guardianship of said children, and that a portion of the property was then levied on, by virtue of a *fi fa* from Fayette Superior Court, in favor of Austell & Camp, against the said Jackson C. W. Gausden, and would be sold, unless restrained and prevented by the process of the Court.

This bill prays the defendant's answer as to the facts stated in the bill, and that the further progress of the *fi fa* of Austell & Camp be enjoined; and that the said Jackson C. W. Gausden be restrained from reducing the property to possession; and that the administrator may account with and deliver to complainant all of said estate to which the said Mary Ann was entitled in her lifetime, to be by him used and controlled for the sole use and benefit of his said wards; and for general relief.

To this last bill there was a general demurrer filed, alleging a want of equity.

After argument had, the presiding Judge passed the following order and judgment, to-wit:

"According to the practice of the English Chancery Courts, when a bill of this kind was filed, the Court granted a decretal order, requiring the husband to appear before the master, to make proposals of settlement, and if the wife died before the order, no right survived to the children. But if she died after the order, this right survived. In this State, we have no such practice, and to make the rights of the children depend on a proceeding which cannot take place, would be to defeat their claim entirely. As this is a new question of practice in England, and believing that the rule ought to be so modified to suit our own practice, as not to defeat the claims of the children, it is ordered that the demurrer be overruled."

To this order and judgment the defendant in the Court below excepted, and now asks that it may be reversed.

A. W. STONE, for the plaintiff in error.

M. M. TIDWELL, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

The question in this case is one of interest and new in this Court.

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Mary Ann Gausden filed a bill in behalf of herself and children, against the administrator *de bonis non cum testamento annexo* of her deceased father, Wright Martin; praying that certain property bequeathed to her by her said father, and not reduced to possession by her husband, be set apart for the support of herself and children.

Pending the bill, and before any order, interlocutory or final, had been passed, the complainant died. A Supplemental Bill was filed by the children, praying that the property in question, and alleged to be still in the hands of the administrator, might be set apart for the maintainance and education of the children. A general demurrer, for want of equity, was filed to the bill, and overruled; and the point presented for adjudication is: Does the wife's right in equity to a settlement survive to her children—she dying pending the bill?

By the practice of the English Chancery Courts, where such a bill was filed, the Court grants a decretal order, requiring the husband to appear before the Master and make proposals for a settlement; and if the wife died before the order, the weight of authority, in that country, is—notwithstanding decided cases to the contrary—no right survived to the children; *aliter*, if she died after the order. (*Chauncey's Rights of Women*, Chap. vii., p. 532.)

In this State, we have no such practice as that adopted in England. Would it be right to cut off children, after the death of their mother, from a provision out of her unsettled equitable portion, for want of such decretal order? We think not. And, believing that some rule ought to be adopted, founded on principle, and in accordance with the organization of our own judiciary, we affirm the judgment rendered in this case.

This doctrine is very fully stated by Mr. Hovendon, in his Treatise on Frauds. He says: "The claim of children to have a settlement made on them out of their mother's equitable property, is entirely dependent upon her living up to the period of a final decree for a settlement upon her and her issue; a decree that the husband should lay before the Master proposals for such a settlement, will not establish the claim of the children, which may be disappointed by the mother if she see fit to come into Court and give up the property. The right of the children, in such case, can only arise out of contract, or final decree."

"But if the mother die, after a proposal for a settlement is directed, without having waived the benefit thereof, then, although such settlement was not completed in her lifetime, the husband will be bound by the proposal, as well as his assignees—for the right of the wife does not depend upon a decree or order: her equity attaches at the same time with the jurisdiction of the Court; and, when once a bill has been filed in her behalf—though she should die before any answer is put in—yet, if she has not waived her equity, her children will have an immediate right to the provision—which their mother could have required, if she had lived." (*Two volumes in one*, p. 79.)

Thus it will be perceived, that, according to Mr. Hovendon, the right of the wife does not depend upon the decretal order, but her equity attaches with the jurisdiction of the Court—that is, when the bill is filed: and that the rights of the children, who claim through her, and not as an independent and substantial right in themselves, will not be lost by the death of the mother—she not having waived her right.

And Lord Chancellor Eldon, in the case of *Murray vs. Elibank*, (10 *Ves. Chan. Rep.*, 83,) in referring to the case of *McCauley vs. Philips*, decided by Lord Alvanley, remarked: "I should have supposed that a decree made in the cause proceeded upon the right or equity in the wife *at the filing of the bill*; for decrees are only declarations of the Court upon the rights of the parties, *'when they begin to sue.'* The wife is entitled to call for a declaration; that she then had a right to a provision for herself and her children."

Mr. Justice Story states the doctrine thus: "The equity of the children is not one to which, in their own right, they are entitled. It cannot, therefore, be asserted against the wishes of the wife, or in opposition to her rights. The Court, in making a settlement of the wife's property, always attends to the interests of the children; because it is supposed that, in so doing, it is carrying into effect her own desires to provide for her offspring. But if she dissents, the Court withholds all right from the children. But the right of the children to the benefit of a settlement attaches *upon the wife's filing a bill for that purpose*; and if she should die pending the proceeding, without waiving the right to a settlement, the children may, by a Supplemental Bill, enforce their claim." (*Stor. Eq. Jur.*, § 1419.)

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And for the principle thus broadly asserted by Mr. Justice Story, numerous English cases are cited.

We feel authorized, then, to hold that the right of the children attaches upon the filing of the bill by the wife in her lifetime; and that her subsequent death will not defeat the claims of the children. And this appears to be the principle upon which the doctrine rests. If the wife die without asserting her right, she is supposed to have waived it for the benefit of her husband—and this she may do in England, even after the decretal order is passed. But having once asserted her right, the jurisdiction of Equity attaches, and it will be exercised for the benefit of the children, although the wife die before a final decree is rendered. If this is not so, then it will be perceived that children in this State are in a worse condition than in England. For there, their right is fixed by the decretal order, unless waived expressly by the mother afterwards; and it is not suspended upon the death of the mother, until a final decree, as is contended for by counsel for the plaintiff in error, is the case here.

It is argued that it interferes with the statutory privilege of the husband, to acquire, by administration, the right to recover and hold, without being subject to distribution, all the rights and credits of his deceased wife. But he takes this right subject to all the incidents resulting from the wife's equity. After a decretal order in England, the husband could not, upon the death of the wife, exclude the children by administering upon his wife's estate; and if their right here attaches upon the filing of the bill by their mother, this is not such a right in his wife as he could be entitled to recover for his own use.

The doctrine of a wife's equity to a settlement, as against her husband, his creditors and assignees, is comparatively modern in Georgia. Its enforcement was unknown in practice when I came to the Bar. The case before us is another step in the right direction; hence, we desire to see it established upon a firm foundation. We doubt not it will commend itself to the favor of the public, as well as of the profession.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

DAVIS *et al. vs.* THE BANK OF FULTON.

1. The Charter of a Bank, granted by Act of the General Assembly of Georgia, is a Public Act, and Courts must take judicial cognizance of it, in all cases, without having been specially given in evidence.
2. Where a clause in a Bank Charter authorizes the joining in one action of all parties, to a note or bill given to be negotiated, or actually negotiated in that Bank, such joinder is proper.
3. Such a clause in a Bank Charter is not unconstitutional, because not expressly recited in the title of the Act of incorporation.

Assumpsit, in Fulton Superior Court. Tried before Judge BULL, at the April Term, 1860.

The Bank of Fulton brought an action in Fulton Superior Court against James C. Davis, as drawer and endorser, and Williams, Rhea & Co., as acceptors, to recover the sum due on a bill of exchange, drawn by James C. Davis, addressed to the said Williams, Rhea & Co., and accepted by them.

The defendants pleaded to said action: the general issue: payment; set-off; misjoinder of parties defendant; and that there was no such Bank as the Bank of Fulton.

On the trial in the Court below, the plaintiff introduced in evidence the bill of exchange sued on, which was read to the Jury without objection.

The plaintiff, also, proposed to prove, that the bill of exchange sued on, was presented to the makers, and payment demanded and refused, and notice to the endorsers, which testimony was objected to by defendants. The objection was overruled and the testimony admitted, and the defendants excepted. The plaintiff then closed his case.

The defendants' counsel then moved the Court for a non-suit, as to the endorser, on the following grounds:

1st. Because the plaintiff had sued as a corporation, and there was no proof of such corporate body capable of bringing this suit.

2d. Because the bill of exchange, read in evidence, showed that it was made for the purpose of being negotiated, and was actually negotiated at a chartered Bank, and as such, the drawer, endorser and acceptors could not be sued in the same action, and that they were improperly joined as defendants in this case.

3d. That the 11th section of the Charter of the Bank of

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Fulton is void, as it contains matter different from what is expressed in the title of the Act incorporating said Bank.

The presiding Judge overruled the motion for a non-suit, and a verdict and judgment were rendered for the plaintiff.

To these rulings of the Court, the defendants excepted, and bring the writ of error in this case, to reverse the judgment.

A. W. STONE, for the plaintiff in error.

J. I. WHITAKER, for the defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

1. The first exception to the ruling of the Court below assumes that in a case, wherein a corporation is plaintiff, the Court is bound to ignore its existence, unless an exemplified copy of the Statute incorporating it, be put in evidence. We hold, that by the first section of "An Act to regulate the admission of evidence in certain cases," &c., *T. R. R. Cobb's Digest*, 272, Bank Charters are Public Acts, and it is made the duty of Courts to take judicial notice thereof, as in case of other public laws.

2. The exception on the ground of misjoinder of the defendants is not well taken, because, although the general rule is as therein stated, this case is governed by the 11th section of the Charter of the Bank of Fulton, which expressly authorizes such joinder.

3. The 11th section of the Charter of the Bank of Fulton is not unconstitutional, as "containing matter in the body of the Act different from what is expressed in the title thereof." Had a section been incorporated in this Charter, altering the *General Law*, in regard to the joinder of drawers, endorsers and acceptors of bills so negotiated, or meant to be negotiated in Bank, the exception would have been well taken. But under the title "An Act to incorporate the Bank of Fulton," no grant, or privilege, or franchise, necessary or proper to a Banking Institution, is matter different from what is expressed in the title. The 11th section is but the grant of such a privilege.

We find no error in the rulings of the Court below.

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JUDGMENT.

Whereupon, it is considered and adjudged by the Court. that the Judgment of the Court below be affirmed.

EVANS *et al.* vs. LIPSCOMB *et al.*

1. Is the remedy given by the Act of the 15th January, 1852, entitled, "An Act to regulate the mode of suing the bonds of Executors, Administrators and Guardians," applicable to any controversies, other than matters of account, strictly based upon returns to the Ordinary, and limited to surcharging for items improperly entered, or omitted, or undercharged, or overcharged? Query?
2. It is not error in the Court, to charge the Jury, on request, that, when a witness testifies to facts, incoherently, or inconsistently, that circumstance goes to his credit, and if his testimony be very incoherent or inconsistent, it should be considered with great caution.
3. The *general rule*, governing parol gifts of chattels, is, that to constitute a valid gift, there must be an actual delivery of the chattel at the time of the gift, accompanied by words characterizing the act as a gift; and the act done and the words spoken, must clearly establish the transfer of dominion over the chattel from the donor to the donee.
4. A delivery of a chattel, preceded and followed by declarations of the party delivering it, that he had given the chattel to the party receiving it, though none of those declarations were precisely contemporaneous with the act of delivery, may constitute a valid gift, *provided* that the delivery be followed by a continuing possession in the party setting up the gift, of such a character as to indicate an abandonment of dominion by the former owner, and its acquisition by the possessor; and all the facts evincing change of dominion should be closely scrutinized.

Debt, in Troup Superior Court. Tried before Judge BULL. at the May Term, 1860.

This was an action brought against Mrs. Harriet Lipscomb and her securities, on a bond given by her, as the administratrix of the estate of Mildred Bowling, deceased, to recover the amount due Thomas J. Bowling, William D. Bowling, and Archibald W. Tyre, in right of his wife, Mary M. Tyre,

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formerly Mary M. Bowling, as distributees of the estate of the said Mildred Bowling, deceased.

The plaintiff alleged in his declaration the following breaches of the bond sued on, to-wit :

1st. That the administratrix had not made a full inventory of the said estate and exhibited the same to the Ordinary.

2d. That she had not well and truly administered said estate, and rendered a just account of the same.

3d. That she had not paid said estate, or the proceeds thereof, to the persons entitled to the same by Law.

Upon the trial of said case, the following testimony was introduced and submitted to the Jury, to-wit :

Evidence for the Plaintiff.

John Motley sworn, said: He knew Mildred Bowling in her life-time, and knew her property. She owned a plantation in Heard county, on Brushy Creek, of about 300 acres. 202½ acres worth \$12.50 per acre; and ½ lot, 100½ acres, pine land, worth \$5.00 per acre. Knew her to have her negroes on this place, and she carried on farming business there, in 1855.

Winnie, worth about \$200; Aaron, about 45 years old, worth \$1,200 or \$1,300; Margaret, 35 years old, worth \$1,000; Martha, 15 years old, worth \$900; Mary, about 20 years old, worth \$800 or \$900; George, about 14 years old, worth \$800; Greene, 15 or 16 years old, worth \$1,000; Frances, 15 or 16 years old, worth \$900; Harriet, 10 or 11 years old, worth \$500.

Margaret had two or three children: Frances had a child: did not know them sufficiently to be satisfied with his opinion as to their value. Witness was then asked the value of some of the negroes for hire. To this defendant objected, and objection was overruled.

Aaron was worth, average, per annum, \$120; Margaret and her small child, \$30 or \$40; Martha, \$70; Mary, \$70; George, \$80; Greene, \$80; Frances, \$75.

Plaintiff then proposed to question witness as to present or increased value of the property. Defendant objected, and objection was overruled. Being questioned, he answered:

Martha, \$1,000 or \$1,100; George, \$1,200; Greene, \$1,200; Frances, \$1,000; Harriet, \$600; Margaret is dead: Winnie worth nothing; Aaron, \$900.

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The negroes were working together with Mrs. Lipscomb's at her death; were under Mr. Turner. Saw the hands on Mrs. Lipscomb's place, near Brushy Creek place. Did not see the old negroes and children; saw the hands there; Mrs. Bowling had farmed to herself, and had a separate overseer, 1854, and previously.

RE-EXAMINED. Mrs. Lipscomb's and Mrs. Bowling's negroes worked both places, in 1855, together.

Emanuel Britain sworn, said: Sometime in the fall of 1854, about the time Mrs. Bowling and Mrs. Lipscomb were moving to La Grange, witness met them in the road near Mrs. Lipscomb's place, between the river and Houston; they were in a carriage together. He had a conversation with them. Mrs. Bowling said, she and Harriet (Mrs. L.) had concluded to put their forces together and farm together; and this was in reply to an expression of solicitude on the part of witness, at having heard that they were moving to LaGrange. She said, it would be a saving, and asked witness' opinion about it. Gresham was Mrs. B.'s overseer at that time. Witness knew several of the negroes, one or two. The value placed upon them by Motley was about right and fair. They said they were to go equal shares in the farm for 1855.

Timothy L. Harris sworn, said: Just before Mrs. Bowling and Mrs. Lipscomb moved to town, while they were all sitting at Noah Lee's table, Mrs. Lipscomb said that she and her mother (Mrs. B.) would move to LaGrange; that they had agreed to farm together, and would have one overseer, which would be convenient and a great saving. This was in reply to a question from Noah Lee, if their move to town would not injure them in their business matters, and what they intended to do with their hands and farming interest. Both ladies talked about it, and said in substance what Mrs. Lipscomb said in her reply.

James Edwards sworn, says: He was with Mr. Britain on the occasion he testified to. It was in the latter part of 1854, or first of 1855. In that conversation, Mrs. Lipscomb said to him that they were moving to LaGrange, and put their interests together, and would farm together and divide the profits. It was their land and negroes. They had moved some of their things to LaGrange. Witness was called, with others, to estimate the crops growing on the Brushy Creek place in fall of 1855. It was in corn. Judging from

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its appearance, 100 acres, make 4 bbls. to an acre, worth \$250 to \$1,000. (Objected to. Overruled.)

Harriet, about 12 years old, worth \$600; Orlando, worth \$400.

Priced the negroes about as Motley did. Knew them. Saw another child worth but little. Mrs. Bowling was about 75 years old. The negroes were on Mrs. L.'s place at Mrs. Bowling's death. Judged of crops in field; it was 1855 crop. Gresham was overseeing for Mrs. Bowling at the time of the conversation, and in 1854 for the year. Does not know that Aaron has been frequently sick. Mrs. Bowling told him a year or two before that she wanted to sell her land. Did not hear her speak of it then. Does not know that it was offered for sale after she came to LaGrange.

Sanford H. Dunson, lived near the places of Mrs. Bowling and Mrs. Lipscomb; saw the negroes in 1855. They were at Mrs. Lipscomb's place. They worked on both farms, backwards and forwards. He was with Mr. Edwards in estimating crop, (objected to, and overruled,) on Brushy Creek place. It was worth \$1,000. The houses were good, and house-room plentiful on Mrs. Lipscomb's place. There was scarcely any houses on Mrs. Bowling's place, and they not comfortable; made calculation as Edwards.

Charles W. Hearn: Saw Mrs. L. and Mrs. B. in fall of 1854, at Mrs. Lipscomb's; had a conversation with them about moving to LaGrange. They said they were going to live together. It would be pleasant and a saving. The interrogatories, except those of Aubrey and wife, were then read.

John W. Bellah: Is overseeing for Mrs. Lipscomb, now Mrs. Standford. Knows the negroes.

John, worth \$400; Harriet, worth \$550; Harlan, about 4 years old, worth \$350; another child of Martha, walking about, \$250; another child of Fances, \$200; Orlando, worth \$400. They are all likely young negroes. Margaret's child diseased. He knew a gin worth \$65. It was afterwards sold at Administrator's sale for 25 cents. There had been a sale of perishable stuff before. Nothing else sold that day. It was bought by Mr. Turner, the overseer at the time; Nathan Strong, the bailiff, witness, and Turner, were present. (About gin objected to; overruled.) Knows Aaron; does not know of his being diseased.

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He is about town; worth \$900, if not diseased. Margaret is unsound, and sick nearly all last year; not worth much. Martha and two children, since she had them for hire, worth \$50 per annum; Frances about \$60. Has known the negroes since 1851; has been worth the hire of Margaret to keep her and her children. Supposed the sale had been advertised, as such sales usually are. The crier cried the gin as long as he could get a bid. There were three bids. Does not know and did not hear that Turner bought the gin for any one. Margaret is dead.

Dr. N. N. Smith sworn, said: During the last illness of Mrs. Bowling, and a short time before her death, two or three days, as witness was about to leave, Mrs. Lipscomb spoke to him about Mrs. Bowling's making a will. She said her mother (Mrs. B.) had given her money, and they had bought the place near LaGrange together; and asked witness if he thought Mrs. Bowling was in a condition to make a will; witness replied that he thought she was in a condition to make a will, but that he thought the matter could be safely deferred to another time. Mrs. Bowling died soon afterwards. Witness was her attending physician. She died 27th of February, 1855. His first visit was about the 1st of February, 1855. She did not specify other property. Mrs. Bowling was a woman of good natural sense, though without an education. She was a woman of her own opinions, though uncultivated.

Plaintiff introduced the bonds dated June 4, 1855.

It was conceded that the time had been waived to bring up the question on its merits as to title, value, &c., as far as concerned the negroes.

It was admitted that Mildred Bowling paid tax on the property in 1854.

Plaintiff then introduced an exemplification of the actings and doings of Harriet Lipscomb, as administratrix, and the original vouchers filed by her therewith. (Objected to and overruled.) And to which reference is had. Timothy L. Harris said, Mrs. Lipscomb told him in 1854 that she had bought a carriage at Columbus, and her son, Thomas, had selected it for her.

N. M. Harris, sworn, says: Mrs. Lipscomb told him in 1854, that she had bought a carriage at Columbus, of Jaynes & Brother, for about \$400.

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B. C. Ferrell, sworn, says: He was present in the Court of Ordinary when the administration was granted to Mrs. Lipscomb; demand was made of Mrs. Lipscomb to make a bond sufficient to cover the negroes; she refused; but upon hearing the facts before the Ordinary, by mutual understanding and agreement between the parties, the bond was given for \$12,000. The plaintiff insisted that the bond ought to be \$16,000. Mrs. L.'s counsel remarking that it was immaterial what amount the bond was for. Mrs. Lipscomb claimed the negroes. Plaintiff closed.

Defendant opened his Defence, and read Interrogatories.

Dr. C. Holt, sworn, said: He is the physician of Mrs. Lipscomb's family. Has examined Aaron; he is badly ruptured and liable to die any moment. Cannot do hard work, and is not worth more than half-price, either for sale or hire. Knows Margaret's small child; has dropsy of the head and is worthless. Martha has falling of the womb; worth about half-price, nothing for hire with her child. Margaret is dead: died of puerperal fever, he thinks. She and children, doctor's bills considered, worthless for hire.

Hernia is curable by an operation or by long and careful use of truss and other treatment. If taken in time, operation is most efficient but dangerous. Prolapsus is curable by rest and other treatment. The rule is, they are possible of being cured. Martha is 34 or 35 years of age. Margaret died a few hours after he first saw her. No other physician called. She must have been sick sometime. Aaron and Martha's diseases are both old chronic cases. Defendants closed.

Rebuttal for Plaintiff.

From Interrogatories of Sample, Mrs. Bowling, Aubrey and Wife. (Objected to and overruled.)

James M. Edwards, recalled: In 1853, at Mrs. Lipscomb's. Mrs. Bowling had a conversation about one of the plaintiffs. John Bowling. He was in Texas, or somewhere out West, and had gone out West, and had written to Mrs. Bowling for money to get back on. She was lamenting the disobedience of children, and said she intended to send him some money, though, she said, it was her opinion that she ought to give one as much as another, and that her duty was to do right; and if, after all she should do, the children threw

it into the fire, she had nothing to do with it. She said she would do her duty, and give them their portion, and asked witness if that was not right. Witness agreed with her. She had frequent conversations with witness about the distribution of her property, and said in each, in substance, that she would do her duty, and her conscience should be clear, and that the Law made a good enough will for her, and that she would not make any will. She said she expected to send \$10 to John Bowling. Mrs. Bowling was in her dotage rather: she was more childish as she grew older. Witness never examined her mind, and she always talked rational. Mrs. Martha A. Sample's husband and Mrs. Lipscomb had a good many lawsuits.

John Motley: His wife's brother married Mrs. Bowling's sister. He knew her intimately, and there was frequent visiting between the families. He heard her speak of the disposition of her property for thirty years off and on, and often she said, the Law made a good division or distribution for her; that that was good enough for her. On several occasions he heard her say that her father had put all his property in the hands of his son, John Dean, to give it off to his sisters, and that she thought she never got her part. Therefore she was not going to attempt to give off or divide; that the Law would divide it right, and then her children and grand-children could not complain of her after she was dead.

Timothy L. Harris: Has heard Mrs. Bowling say, at his house and at Mrs. Lipscomb's, that the Law made a good enough will for her. In November or December, 1854, he heard her say, in a conversation with him, that she had been very severely sick; that they had been at her to make a will, or dispose of her property; that Dr. Pharr had spoken to her about it; that the Law was will enough for her, and that the Bowling children were as near to her as anybody.

James K. Strickland: Had conversation with Mrs. Lipscomb, at her house, in January or February, 1855. Mrs. L. said she had employed Mr. Turner as overseer, for 1855, and wanted to know of witness if he knew him, and whether he would do; said he was to work her place and her mother's land on Brushy Creek, both. That they had concluded to live together; and Mr. Turner could attend to both places. There was nothing said about the hands working together.

Dr. R. A. T. Ridley, sworn, says: In 1857. he was called

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to Mrs. Lipscomb, to see a sick negro, Mary. Mrs. L. said that Mrs. B. had given her Mary and one-half the land whereon they lived. It was shortly before, or after Court that year, in Spring, and she spoke of the suit, and said that the children had refused to let her have the girl, and the house and lot. She expressed regret that her mother had not made a will. Said she had spoken to Dr. Smith about it, and he was mistaken as to her disease, and thus she had not made a will. She said the Bowling children were spendthrifts, and wanted to know of him if something could not be done to preserve the property for them. His recollection is very indistinct, and he does not know that he remembers correctly what Mrs. L. said. She left the impression that the house and lot and Mary were the property in dispute; and she asked if something could not be done to preserve the property for the Bowling children. Witness thought she said that was all involved in the litigation.

For Defendant.

Mr. Nathan Lipscomb, sworn, says: His sister, Mrs. Samples, was not at his mother's house at his grandmother's (Mrs. B.'s) death, but was living over the river.

Interrogatories of Malinda Murr.

First interrogatory: I know John T. Bowling and Harriet Lipscomb; I have seen William T. Dansby, but do not know the other parties.

To the second interrogatory she answers: I was acquainted with Mildred Bowling in her life-time. I knew her about fifty years. I have heard her speak of the disposition of her negroes—but not of other property. I have heard her say at many different times that she intended that her daughter, Harriet Lipscomb, should have *all* her negroes. This was in Heard county, Georgia, at my residence, about eight or nine years ago—all in one year. I do not recollect of hearing her say anything particularly about giving property to others, but I know that she had given property to her son, John Bowling.

To the third interrogatory she answers: I do not recollect to have heard Mrs. Bowling specify what she had given to her son, the father of the plaintiffs, in his life-time, and to his family, or what she had given her daughter, Mrs. Lipscomb.

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I have already stated that I have frequently heard Mrs. Bowling say that she intended that her daughter, Harriet Lipscomb, should have *all* the negroes; that she wanted them kept together; that Mrs. Bowling (her daughter-in-law) had said to her that she (Mrs. Mildred Bowling) ought to let her have some of the negroes, particularly a negro girl, but that Mrs. Bowling—her daughter-in-law—should not have *her*, nor any of the other negroes, but that Harriet should have them all; I know of no other reasons assigned; and further, know nothing more that will benefit the defendant.

Answers to Cross Interrogatories.

To the first cross interrogatory she answers: I have already answered when the conversation took place. The conversation in Heard county took place at Mrs. Lipscomb's, where Mrs. Bowling lived. Sometimes we were alone. Sometimes, I think, Harriet Lipscomb was present. Some of the negroes were on a plantation. I think one of the negroes was hired out that year, but am not certain of this fact. The conversations were not had in the presence of the negroes. I do not know that Mrs. Bowling continued to claim the negroes, as I had not seen her for five or six years before her death. I never heard Harriet Lipscomb say anything to her mother about making a will, or any conversation such as is inquired about in this cross interrogatory.

To the second cross interrogatory she answers: The Bowling children were living on Mrs. Bowling's land at the time to which I have testified, about eight or nine years ago; further, of my own knowledge, I know not. I have already stated that Mrs. Bowling was living with her daughter, Mrs. Lipscomb. She was not very infirm at that time; her mind, I think, was as good then as it ever was. She was then sixty-three years old, or thereabout. Harriet Lipscomb was very kind to her mother. I have already stated all that I know about Mrs. Bowling's intentions, and who was present, and know nothing more in favor of plaintiffs.

To the third cross interrogatory she answers: John Calvin Johnson and David Blalock were present at the taking of my interrogatories. No person has consulted me about my answers. I have not seen Mrs. Lipscomb for eight or nine years. She has not written to me on the subject. A gentleman brought the interrogatories to me; his name I have forgotten.

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He said he wished me to answer them, and said nothing more to me. I am the sister of Mrs. Mildred Bowling, and consequently the aunt of Mrs. Lipscomb. I have lived for the last five or six years—each year and every year—with my brother, Captain John Dearee, who resides in Clarke county, Georgia, and have remained with him all that time, except when absent on visits, say once or twice each year.

MALINDA ^{her} MARR. _{mark.}

Answered, subscribed and sworn to before us, this, the thirteenth day of October, eighteen hundred and fifty-six.

JOHN CALVIN JOHNSON, Commissioner, [L. S.]

DAVID BLALOCK, Commissioner, [L. S.]

Interrogatories of Robert Gresham.

The first interrogatory witness answers: I do.

To interrogatory second, he answers that he was acquainted with Mrs. Mildred Bowling in her life-time; knew her about fifteen years; worked for her about four years; thinks the first year was in 1849; then in 1852, 1853 and 1854, as overseer.

To interrogatory third, he answers: That Mrs. Bowling, as mistress, and he, as overseer, had control of her negroes during the year 1854. Mrs. Bowling had a conversation with him as to the disposition of her negroes, on or about the first of December, 1854. Witness was at the house of Mrs. Harriet Lipscomb, when Mrs. Bowling asked him, "how long it would be before he got through gathering his crop?" Witness replied that "it would be nearly a week." She then observed, "that the reason she asked the question was that she wanted him to get through soon, as she wanted to deliver the negroes up to Harriet."

To the fourth, he answers, that he has answered the first question in answer to third interrogatory.

When witness got through with the negroes, he sent word by his wife to Mrs. Bowling. * * * In two or three days, a boy, hired for that year by Mrs. Bowling, came with Mrs. Harriet Lipscomb's cart for the negroes, and took them away; and he saw them a few days afterwards at Mrs. Lipscomb's plantation.

To interrogatory fifth, he answers: He heard Mrs. Bowling state that she "had given the negroes to Mrs. Lips-

comb: for that, previous to this gift, she had given the others more than she had given Mrs. Lipscomb." She said, also, "that she had done a good deal for the others, but they did not take care of what they had, and it seemed of no use to give them anything more."

To interrogatory sixth, he answers: Mrs. Bowling then offered her plantation for sale; witness thinks at \$3,500. Thinks she at first intended to rent the place, if it did not sell; but afterwards heard Mrs. Bowling say to Mrs. Lipscomb that, "if she was not satisfied to live where she was, she, Mrs. Bowling, would give Mrs. Lipscomb her place, provided she, Mrs. Lipscomb, could sell it, and buy one that suited her." In 1855, Mrs. Lipscomb cultivated the place. Witness knows nothing of who gave Mrs. Lipscomb permission, except what he has already stated.

To interrogatory seventh, he answers: That, some little time after the negroes went into the possession of Mrs. Lipscomb, he went to the house of Mrs. Lipscomb and she came into the room where witness and Mrs. Bowling were and spoke of the disorderly conduct of one of the negro women, formerly Mrs. Bowling's. Mrs. Bowling replied that she had given them to her, and she, Mrs. Lipscomb, must manage them the best she could. Witness knows nothing more to benefit defendant.

ROBERT GRESHAM.

Answered, subscribed and sworn, before us, this, the 29th of August, 1856.

LYMAN F. WILCOX, Commissioner.

JAMES BRADFELD, Commissioner.

Interrogatories of Mrs. Harriet Gresham.

To interrogatory first, witness answers: She knows the parties.

To interrogatory second, witness states she was acquainted with Mrs. Bowling in her life-time; knew her some fourteen or fifteen years. Witness heard Mrs. Bowling say she had given her negro property to Harriet. This conversation took place some time in December, 1854, when witness went to the house of Mrs. Lipscomb and informed Mrs. Bowling that the husband of witness had gathered the crop. Mrs. Bowling, at that time, said to her daughter: "Harriet, you must send up for them; send a wagon or cart."

To interrogatory third, witness answers; That she knows

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nothing more of the gift and delivery of the negroes, except that a few days after the above conversation, Mrs. Lipscomb's cart came and took away some of the negroes, and about three months after, saw the negroes at Mrs. Lipscomb's plantation working with the negroes of Mrs. Lipscomb. Witness, some time previous, heard Mrs. Bowling say that "what she gave William Bowling, she intended to give in an education, that he might not spend it." Knows nothing more that will benefit defendant.

Answers to Cross Interrogatories.

To the first, she answers: The conversation first mentioned took place at Mrs. Lipscomb's house. The last one referred to took place at the house of witness; negroes were not present at the time. Witness, and Mrs. Bowling, and Mrs. Lipscomb, were the only persons present at the first mentioned conversation, as witness now recollects; negroes were absent on plantation; don't know that Mrs. Bowling claimed an interest in the negroes up to the day of her death or shortly theretofore—not after the conversation at Mrs. Lipscomb's; don't know that Mrs. Bowling claimed the right to dispose of the negroes by will; don't know that Mrs. Lipscomb ever talked to Mrs. Bowling about disposing of her property by will; never heard Mrs. Lipscomb say anything to Mrs. Bowling about giving her property to her or any one.

Interrogatory second: Witness don't know where the Bowling children lived after the death of their father.

Mrs. Bowling lived with Mrs. Lipscomb during the time of witness' acquaintance with her. Witness does not know her age, but she was an old woman; was quite strong and healthy for a woman of her apparent age. In 1854, she was able to walk over the plantation and visit the witness, who lived a mile from where Mrs. Bowling lived. Mrs. Lipscomb took good care of her mother; witness saw no evidence of a weak mind; witness does not know when the gift was made. At the conversation referred to at Mrs. Lipscomb's, Mrs. Bowling spoke as though she had given them before, and then directed her to send for them. I have already stated who was present.

To interrogatory third, she answers: The commissioners, my husband and myself, are the only ones present at the

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taking of these interrogatories. No one has consulted with me about my answers. Witness is not related to Mrs. Lipscomb as she knows of. Witness, for the last five or six years, has lived at home, in Heard county, Georgia, and lives there now.

HARRIET ^{her} ~~mark.~~ GRESHAM.

Answered, subscribed, and sworn to, before us, this 29th October, 1859.

LYMAN F. WILCOX, Commissioner.

JAMES BRADFIELD, Commissioner.

Interrogatories of Miss Phoebe Mabry.

To the first interrogatory, she answers: I know Harriet Lipscomb and Daniel McMillan.

To the second interrogatory, she answers: I was acquainted with Mrs. Mildred Bowling; I knew her about two months before she died, in January and February, 1855, at the residence of Mrs. Harriet Lipscomb, in Troup county, Georgia. She did have a conversation with me about the disposition of her property, a few days before she was taken sick, in February, 1855, at the said Mrs. Lipscomb's said residence. She said she had given her negroes to her daughter, Mrs. Harriet Lipscomb, because she had previously given property to Polly Bowling's children, and they seemed not to take care of anything she gave them, and it never did them any good, and she did not intend that they should have any of her negro property.

To the third interrogatory, she answers: The reason she gave for not giving Polly Bowling's children any of the negroes, has been stated in answer to interrogatory second. She further stated that she wished the proceeds of the plantation to go to the payment of her debts, and the balance to be divided between Harriet Lipscomb and Polly Bowling's children; and she requested me to write to my brother, Charles W. Mabry, to come and write her will, as she had given Harriet Lipscomb her negroes, and wished to so state in a will, so that Harriet Lipscomb would not be put to unnecessary trouble in retaining them after her death.

Answers to Cross Interrogatories.

To the first cross interrogatory, she answers: All that I know relative to the gift of the property is what Mrs. Bow-

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ling told me, and is stated in my answers to the direct and foregoing interrogatories.

To the second interrogatory, she answers: I remember of nothing further than I have stated in the foregoing answers.

Answered, subscribed, and sworn to, before us this 11th day of September, A. D., 1856. PHEBE MABRY.

WM. W. GUNTER, Commissioner.

WM. R. COURTNEY, Commissioner.

RICHARD B. YOUNG, Commissioner.

Interrogatories of Noah Lee.

To the first direct interrogatory, he answers: I do.

To the second direct interrogatory, he answers: I was acquainted with Mrs. Mildred Bowling in her lifetime; I was acquainted with her about twenty-five or thirty years.

To the third direct interrogatory, he answers: I frequently heard her say that she intended to give her negroes to Harriet Lipscomb, about four years ago at Mrs. Harriet Lipscomb's house, (then in Heard county,) and she said the same words, at different times, at my house in this county; she said she wanted to keep the negroes together as long as Harriet Lipscomb lived; she said to me, repeatedly, that she intended to give her negroes to Harriet Lipscomb; and she said farther, that she had put the negroes into the possession of Harriet Lipscomb, and she did not design to carry on her farm any longer.

To the fourth direct interrogatory, he answers: She, Mrs. Mildred Bowling, said she intended to sell her land and pay her debts first, and the balance of the money she intended to divide among the children of Mrs. Mary Bowling. Her negroes, she said, it was no use to give any of them to the Bowling children, as they would only be squandered away. Part of her reason was that she wanted her negroes to be kept together; and that was the object in giving the negroes to Harriet Lipscomb; so that the said Harriet would keep the negroes together, and in her own possession, during her, the said Harriet's, natural life. This is all that witness recollects on this part of Mildred Bowling's conversation.

To the fifth direct interrogatory, he answers: She said that it would be no use to give any of her negroes to plaintiffs, as they were of a spendthrift and idling disposition, for she did not want to have her negroes scattered. Witness

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does not recollect of the said Mildred saying anything about the money that Mrs. Lipscomb had to pay on account of the father of the plaintiffs, though in connection with this, she said that she wanted Mrs. Lipscomb to have her negroes during Harriet Lipscomb's life. * * *

To the first cross interrogatory, he answers: That he did not see Mildred Bowling give her negroes to any body, but that she said she had given them to Mrs. Harriet Lipscomb, and that she, said Harriet Lipscomb, had them then in possession. During the conversation, a negro woman came into the house, (Mrs. Lipscomb's house,) and Mildred Bowling said, her daughter, Harriet Lipscomb, wanted the woman, and Mrs. M. Bowling said she had bought the woman named Margaret for Harriet Lipscomb.

To the second cross interrogatory, he answers: That he knows nothing more that will benefit the plaintiffs.

NOAH LEE.

Answered, subscribed, and sworn to, before us, this May 7th. 1856.

WM. F. FORMBY, Commissioner.

ARCHIBALD G. STANDFORD, Commissioner.

Robert M. Turner's Interrogatories, taken by Defendant.

To the first interrogatory, he answers: I do.

To the second interrogatory, he answers: I was acquainted with Mrs. Mildred Bowling from the Spring of 1853 till 1855, when she died. I was acquainted with the negroes of Mrs. Mildred Bowling, the names of some of which was Aaron, Winny, Margaret, Martha, Frances, George, Green, who were field hands. I commenced overseeing about the 20th December, 1854, for Harriet Lipscomb, and found the negroes above named on her plantation, and one I moved there afterwards. I know nothing about Mrs. Mildred Bowling parting with her negroes to any one. Mrs. Mildred Bowling told me if she did not sell her land before I got ready to go to ploughing, I must cultivate it for Mrs. Harriet Lipscomb in 1855. The land was cultivated in 1854 by Robert M. Gresham for Mrs. Mildred Bowling. The negroes were in the possession of Mrs. Bowling in the year 1854 till the latter part of the year. I moved one negro to Mrs. Lipscomb's plantation by the direction of Mrs. Bowling.

To the third interrogatory: I never heard Mrs. Bowling

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say she had given the negroes to Mrs. Lipscomb. I have stated all I know that will benefit defendant.

ROBERT M. TURNER.

Answered, subscribed, and sworn to, before us, this May 13th, 1857.

BENJAMIN S. ASKINS, Commissioner.

CHARLES J. McDOWELL, Commissioner.

Robert M. Turner's Interrogatories, taken by Plaintiffs.

To the first direct interrogatory, he answers: He does.

To second interrogatory: I had no conversation with any person about Mrs. Bowling's negroes during the year 1855, or any other year.

To third interrogatory: If Mrs. Bowling carried on any farm I did not know it.

To fourth interrogatory: I was overseer; I do not know whose negroes they were, but found them on Mrs. Lipscomb's plantation, except one negro woman, which I moved there by request of Mrs. Bowling as cook for me. I was employed by Mrs. Lipscomb, and I looked to her for my pay, as she employed me, and then nothing could be said about who should pay me.

To the fifth interrogatory: I heard Mrs. Lipscomb say nothing about any person overseeing Mrs. Bowling's negroes in the year 1855. Mrs. Bowling went to LaGrange in the Fall or Winter of 1854, and remained there until her death, as far as I know. I never heard Mrs. Bowling say anything about the title of the property. I know nothing more that will benefit the plaintiffs.

To the first cross interrogatory, he answers as follows: She did, and she alone. Myself, Mrs. Lipscomb, Nathan and one of her daughters, I think, was present when we made the bargain.

Second cross interrogatory: I did hear Mrs. Bowling say that she would let Mrs. Lipscomb have her land to tend in the year 1855, if she did not sell it. I know nothing more that will benefit the defendant. Nobody present but the Commissioners.

ROBERT M. TURNER.

Answered, subscribed, and sworn to, before us, this 13th of May, 1857.

BENJAMIN S. ASKIN, Commissioner.

A. ALONZO A. WATTS, Commissioner.

*Evans et al. vs. Lipscomb et al.**Sarah Strickland's Interrogatories, taken by Defendant.*

To the first interrogatory she answers and says: I am not acquainted with Thomas C. Evans; I am acquainted with A. W. Tyre and wife, and with Harriet Lipscomb, formerly, but now Harriet Standford, but don't know Jno. W. Robertson, Daniel McMillan, nor Wm. F. Dansby.

To the second interrogatory, she answers and says: I was acquainted with Mildred Bowling in her life-time. I never heard her say anything about her son, John W. D. Bowling, that I recollect; I heard Mildred Bowling say that she had done all that she ever intended to do for John Bowling, her grand-son. I do not recollect that I ever heard her say anything about any of the rest of John W. D. Bowling's children, or what she intended to do for them. She said that she had done all that she ever intended to do for John Bowling. She said that she had stood John Bowling's security to keep him out of jail, and that she never intended to do any more for him. This is all that I now recollect that she said about it. I know nothing more that will benefit the defendant.

To the first cross interrogatory, she answers and says: As well as I now recollect, I became acquainted with Mildred Bowling some nine or ten years since. She lived at Houston, in Heard county, with her daughter, Harriet Lipscomb, at the time I became acquainted with her, about two miles from where I resided. The conversation which I have testified about, took place at Mrs. Harriet Lipscomb's house, where her plantation now is, in Troup county, about three miles East of Houston, in Heard county, in this State. There was but one conversation; it has been some six or seven years since, as well as I now recollect. I cannot recollect precisely the time, not having charged my memory particularly about the matter. I do not now recollect that there was any person present but myself and Mildred Bowling. She said that she had stood John's security to keep him out of jail, and she did not intend to do any more for him. These are the words and language as well as I can now recollect. I have given her language as well as I recollect. I do not now recollect whether Mrs. Harriet Lipscomb was present or not. I will be twenty-two years old on the 30th of July next. I have stated all that I know about the matter. I do not know whether Harriet Lipscomb is entitled to all the property or

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not; or what, or any part she is entitled to. I know nothing more that will benefit the plaintiffs.

SARAH STRICKLAND.

Answered, subscribed, and sworn to, before us, this 13th May, 1859.

WARREN L. STRICKLAND, Commissioner, [L. s.]

BLAKELY L. HARRIS, Commissioner, [L. s.]

Dr. Edwin Pharr's Interrogatories, taken by Plaintiffs.

To the first direct interrogatory, he answers: That he is acquainted with the parties except John W. Robertson.

To the second direct interrogatory, he answers: I am a physician, and my business, the practice of medicine. I was acquainted with Mrs. Mildred Bowling in her life-time. I knew her since the year 1849, up to the time of her death. I have rendered her professional service ever since the year 1850, up to a short time before her death, as a physician. In the month of July, 1851, Mrs. Mildred Bowling had a very severe "attack" of sickness. Mrs. Mildred Bowling asked me if I thought she would recover; I told her I thought she would. I then asked her the reason why she asked me that; did she wish to make her will? She replied no, that the Law was a sufficient will for her. This conversation occurred in the year 1851, in the month of July, at Harriet Lipscomb's house; and again in the month of November, in the year 1854, Mrs. Bowling told me the Law was as good a will as she wanted; there was nothing more said about a distribution of her property at her death, at that time, further than above stated. This conversation occurred in the year 1854, at the house of Mrs. Harriet Lipscomb. In the year 1851, I considered her mind as strong and as firm, or firmer, than women generally of her age. In the year 1854, I considered that her mind had changed and was not so strong, but more yielding or rather more childish, and would yield more readily to the influences of those she loved, or that she had confidence in, than in the year 1851.

I was called to see Mrs. Mildred Bowling, in my professional capacity, on the third day of November, in the year 1854, and visited her daily up to the 15th of that month, and visited her occasionally up to the seventh day of December, 1854; was the last prescription that I put up for her case. She was then recovering from a very serious attack of Typhoid

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Pneumonia, from which attack I don't think she ever fully recovered, but got up and about, and partially recovered, and soon after removed to my neighborhood, over near La Grange, at which place I saw her in January, or early in the month of February, 1855; and she was at the time in very feeble health. Sometime between the third day of November, 1854, and the fifteenth day of the same month, Mrs. Harriet Lipscomb asked me to be plain and candid with her in relation to her mother's situation, whether I thought she would live or die. I informed her that I thought her mother's case extremely doubtful; my opinion was that she would die. I then stated to Mrs. Lipscomb that I had often heard her mother say that she intended to give her the negro girl, Mary, and I suggested that then was the time to have it in writing, to have the deed of gift made, so that there would be no fuss about it hereafter. She then requested me to mention it to her mother, and insisted that I should do it; and I did so; and when I mentioned it to Mildred Bowling, she told me that she had always intended to give Mary to Harriet Lipscomb, which she did in a few days afterwards, and I was present and witnessed the deed of gift, and after the deed of gift was signed, Mrs. Harriet Lipscomb requested me to mention to her mother that then was a suitable time to make her will, and dispose of the balance of her property, which I did. Her reply was that I had mentioned that subject to her before; and then told me and had told me before, that the Law was as good a will as she wanted. I made the suggestion at Mrs. Lipscomb's request, and I did it as a friend to both, and she replied, as above stated, that the Law was her will. The deed of gift was made just previous, and I do not recollect what happened just subsequent, but I think I went home and went to sleep. I am certain of that.

To the third interrogatory, he answers: That, after Mrs. Harriet Lipscomb and Mildred Bowling moved near La Grange, and a short time previous to the death of Mildred Bowling, I had a conversation with Mrs. Harriet Lipscomb, and she stated to me that it was the wish of her mother for her to keep or have all the negroes of her estate, and that her lands and other property be sold and the Bowling children paid their portion in money, and if there was not enough, she, Harriet Lipscomb, was to make it up to them.

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To the fourth direct interrogatory, he answers: I did have a conversation with Harriet Lipscomb, after the death of Mildred Bowling, in relation to the distribution or situation in which Mildred Bowling left her property. It was shortly after the death of Mildred Bowling, at the residence of Harriet Lipscomb, near LaGrange. Harriet Lipscomb told me that her mother's mind had changed considerably since they had moved down there, in relation to the distribution of her property, but she did not state, at that time, in what particular; but in a conversation in a few days afterwards, at the same place, Harriet Lipscomb told me that her mother had made a verbal will and gave her all the property, a very short time previous to her death.

To the fifth direct interrogatory, he answers that the question is as fully answered in the foregoing answers, as he could answer in this interrogatory. I know nothing more that will benefit the plaintiffs.

To the first cross interrogatory, he answers: Mrs. Bowling was living at the house of Mrs. Harriet Lipscomb at the time of the sickness I allude to. I do not think she recovered fully from the last spell of sickness that I allude to. It was not in the early part of 1854, but in the latter part of 1854. I did not prescribe for her after the seventh of December, 1854. I was not with her in her last illness: I heard nothing after the seventh day of December, 1854, only from Harriet Lipscomb, in relation to the distribution of her property.

To the second cross interrogatory, he answers that, after seeing Mrs. Bowling, in her previous illness, between the third of November, 1854, and the fifteenth of the same month. Mrs. Lipscomb asked me to be plain with her. I do not recollect if I did not state at first that I would be plain to Mrs. Lipscomb, until after she asked me to be plain with her: I then stated that I would be plain with her, and that I thought that her mother would not recover; but there was nothing said, at that particular time, about a will; but I told Harriet Lipscomb that I had often heard her mother say that she intended to give her the negro girl, Mary, and I, then, suggested, that then was the time to have it in writing. Mrs. Lipscomb did not reply that she could not mention such a thing to her mother, nor make such a disclosure; but she, Mrs. Lipscomb, requested me to mention to her mother

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about giving her Mary. Mrs. Lipscomb did not say to me to do as I thought best about it, but requested me to mention it to her mother, which I did. She did not request me to disclose any facts to her mother, at that time, further than is stated in the answer to this cross interrogatory, that I now recollect.

To the third cross interrogatory, he answers: I did not attempt to exert any undue or improper influence on Mrs. Mildred Bowling, at any time, and if Harriet Lipscomb did exert, or attempt to use any undue or improper influence on her mother, I never discovered it. I do not now recollect, at this time, that I ever said so: perhaps I have said that I did not believe she did any such thing as to exert any undue influence on her mother. I know nothing more in favor of the defendant.

EDWARD PHARR.

Answered, sworn to, and subscribed, before us, this 16th day of May, 1857.

JAMES LEWIS, Commissioner, [L. S.]

BLAKELY L. HARRIS, Commissioner, [L. S.]

William Forbus' Interrogatories, taken by Plaintiffs.

To the first interrogatory, he answers: I am acquainted with the parties.

To the second direct interrogatory, he answers: Had a conversation with Mildred Bowling and Harriet Lipscomb about the control of Mildred Bowling's negroes. I went to the house of Mrs. Harriet Lipscomb, for the purpose of making a trade or arrangement to oversee with and for Mrs. Harriet Lipscomb and Mrs. Mildred Bowling, and the following conversation ensued at the house of Mrs. Harriet Lipscomb: Mildred Bowling and Harriet Lipscomb, both, told me that they intended to put their hands together and work Mildred Bowling's and Harriet Lipscomb's plantations together, and put some four or five hands, each, together and crop together, and divide the crops equally between them, and bear equally the expenses in working the crop. The foregoing conversation took place in the early part of the year 1854. Mildred Bowling conversed with me, and Harriet Lipscomb conversed with me at the same time and place.

To the third direct interrogatory, he answers: Mrs. Harriet Lipscomb told me that herself and Mrs. Mildred Bowling intended to put four or five hands, each, together and go

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halves in the expenses and profits in the year 1855. It was about the last of December, 1854, or the first of January, 1855, at the house of Mrs. Harriet Lipscomb. Mrs. Mildred Bowling was at the house of Harriet Lipscomb, and present at the time of the conversation. Mildred Bowling said she was to furnish four or five hands of her own in the above trade, and go halves in the expenses and profits of the crops for the year 1855.

To the fourth direct interrogatory he answers: That Mrs. Harriet Lipscomb told me that she wanted me to oversee for herself and her mother, Mrs. Mildred Bowling, if they did not get Mr. Gresham, for the year 1855. She said, herself and Mildred intended to put four or five hands, each, together, and farm together, and go halves in the expenses and profits of the two farms. I know nothing more that will benefit plaintiffs.

To the first cross interrogatory, he answers: I went to Mrs. Harriet Lipscomb to be employed by her as an overseer, and this was my only business; and it was not, I considered it, material for her to explain to me how she held the negroes; found Mrs. Bowling. All the information I had about the condition of Mrs. Bowling's estate, was from Mildred Bowling and Harriet Lipscomb. My information from them was that she, Mildred Bowling, was to furnish four or five hands and an equal quantity of land with Harriet Lipscomb, and put all under one overseer, and go halves in the expenses and profits in the year 1855. I know nothing about the disposition of her property.

To the second cross interrogatory, he answers: That he did not converse with Mrs. Lipscomb but one time on the subject. I was with her about one and a half hours. There was no one present but myself, Harriet Lipscomb, Mildred Bowling and a portion of Harriet Lipscomb's children. I do not now recollect which of the children. It was in the latter part, or near Christmas, in the year 1854, or the first part of January, 1855. Myself, Harriet Lipscomb, Mildred Bowling, and some of Harriet Lipscomb's children, I do not now recollect which portion of the children, or their names, was all that was present. I do not know anything more that will benefit the defendant. There was no person present at

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the taking of these interrogatories, except myself and the Commissioners.

WILLIAM ^{his} FORBUS.
mark.

Answered, subscribed, and sworn to, before us, this 16th day of May, 1857.

JAMES LEWIS, Commissioner, [L. S.]

BLAKELY L. HARRIS, Commissioner, [L. S.]

Sarah Aubry's Interrogatory, taken by Plaintiffs.

To the first interrogatory, she answers: She knows the parties.

To the second interrogatory, she answers: She has heard a conversation with Mildred Bowling, and heard her say that she had not done as much for Polly Bowling as she intended to do, but intended her to have an equal "share" of her property at her death.

To the third interrogatory, she answers: She heard Mildred Bowling say she never intended to make a will, for the law was will enough, and as to Mildred Bowling being persuaded to make a will, and by whom, she does not distinctly recollect.

To the fourth interrogatory, she answers: She has stated all she knows in the second interrogatory, and that she knows nothing more than she has stated that would benefit plaintiffs.

First. She answers, in 1849, at Nathan Lipscomb's plantation, where Mildred Bowling frequently visited witness and, also, Polly Bowling; and witness asked Mildred Bowling why she did not stay longer with Polly Bowling, and witness says Mildred Bowling said that she would, but Harriet, her daughter, would not let her, and this brought on the conversation in relation to the distribution of her property, and there was no one present.

Second. She answers, she has no recollection of any such conversation.

Third. She answers, that there was no one present but John L. Hurst and Edwin Pharr, who was engaged in taking my answers. Witness answers she knows nothing more.

SARAH AWBRY.

Answered and sworn to, and subscribed, before us, the 16th day of May, 1857.

JOHN L. HURST, Commissioner, [L. S.]

EDWIN PHARR, Commissioner, [L. S.]

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Thomas M. Awbry's Interrogatory, taken by Plaintiffs.

To the first interrogatory, he answers: I know the parties in said case.

To the second interrogatory, he answers: I heard Mildred Bowling speak in regard to the distribution of her property after her death; I have heard her speak of it oftentimes, and she always stated that she intended John Bowling's children should have an equal "share" in her estate at her death. I cannot recall all that she has said, but this is the substance.

To the third interrogatory, he answers: I have heard Mrs. Bowling say she had been requested to make a will, but the Laws of her Country was a sufficient will to divide her property, and consequently she would not make a will.

To the fourth interrogatory, he answers: Mrs. Bowling stated she wanted her property equally divided between John Bowling's children and Mrs. Lipscomb.

First. He answers: The Commissioners only were present at the taking of these answers. I do not recollect any one being present at the conversation referred to but my wife, and dont know that she was present all the time. I have stated about all that passed. Said conversation occurred at my house in 1849, and previous to that time I know nothing more.

THOS. M. AWBRY.

Answered, sworn to, and subscribed, before us, this 14th day of November, 1856.

JAMES LEWIS, Commissioner, [L. S.]

WILLIAM L. HUGHEY, Commissioner, [L. S.]

Mary Bowling's Interrogatories, taken by Plaintiffs.

To the first interrogatory, she answers: I am acquainted with the parties except John W. Robertson.

To the second direct interrogatory, she answers: She was acquainted with Mildred Bowling in her life-time. I knew her about twenty-eight years; I knew her intimately, as I lived in the house with her several years. When I first became acquainted with her, I considered her mind good, but in the latter part of her life, her mind was very wandering. I did not consider her obstinate, but would yield readily to the influences of those she loved. Mildred Bowling bought two hundred acres of land from Nathan Lipscomb, and I heard her and Nathan Lipscomb make the trade, and was present at the time of the trade, and she told me that she had

bought the land for myself and her to live upon, and afterwards Harriet Lipscomb told her to sell the land and not live upon it, and she sold the land and afterwards bought the land back, but she never gave me permission to live upon it: however, she (Mildred Bowling) bought one hundred and fifty acres of land more from George and Thomas Lipscomb, and two hundred acres from Nathan Lipscomb, and Mildred Bowling told me that she wanted to put her negroes on the land, and wanted witness' sons to work with them and cultivate the land, and Harriet Lipscomb objected to it, in my presence, and Mildred Bowling declined the idea.

To the third direct interrogatory she answers: I never had any conversation with Mildred Bowling about any property she had given away while in life. I had a conversation with Mildred Bowling about the distribution of her property after her death. She stated to me that she wanted her property equally divided between her son's children and Harriet Lipscomb. The above conversation occurred in the year 1852, at my house. She stated that she had been persuaded to make a will, but she did not wish to make a will; that the Law of her country would divide her property equally among her heirs, and that was as good a will as she wanted.

To the fourth direct interrogatory she answers: I was at the house of Mrs. Harriet Lipscomb in December, in 1854, and I heard Mildred Bowling say that she had that day killed her pork for the next year, and was sending it up to her plantation for her negroes, for the year 1855. These were the negroes that are now in dispute. She did not say how much she claimed at that time: she did not say whether she had given any part, or any, or all away; she never said anything about giving any of it away in my hearing.

To the fifth direct interrogatory she answers: That she had a conversation with Harriet Lipscomb in February, in the year 1855, about her farming business for that year, and Harriet Lipscomb told witness that her and Mildred Bowling had employed Robert Turner to oversee for herself and Mildred Bowling; and Harriet Lipscomb further stated that the reason they had done so that herself and Mrs. Bowling had moved to LaGrange, and it would be more convenient for them to put their hands together and farm together and put them under one overseer to oversee both plantations; and Harriet Lipscomb further stated, that her mother, Mildred Bowling,

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was to go halves in paying the overseer and all the expenses, and she (Harriet Lipscomb) was to pay the other half, and go halves in the property; she stated that her mother was well pleased with Robert Turner, that she liked him better than she did Robert Gresham; that is all that I now recollect in this conversation about the farming business. Harriet Lipscomb then asked me if I had heard the report that Mildred Bowling had bought that land, that she had moved to near LaGrange, and gave it to her; witness stated that she had heard the report but did not believe it, Harriet Lipscomb replied that witness need not believe it; that she (Mrs. Lipscomb) had heard that Mr. Hearn had told it, but she intended to ask Mr. Hearn about, and if Mr. Hearn had told it, it was not so.

To the sixth direct interrogatory, she answers: That she had a conversation with Harriet Lipscomb after the death of Mildred Bowling; that Harriet Lipscomb sent for witness to come to her house the same day of the death of Mildred Bowling, when Harriet Lipscomb asked witness to walk into the garden, when she said that her mother had died without a will, and had left her property just so, and appeared to regret it very much; that she didn't make a will and fix the property in the hands of witnesses' children, so that it could not be taken from them; and that her mother had always said that she wanted her negroes to have the privilege of picking their masters. The above conversation took place at the house of Harriet Lipscomb, near LaGrange, the day that Mildred Bowling died, in February, 1855, but don't recollect the day of the month. The next day, after Mildred Bowling's death, Harriet Lipscomb told witness that she was not so sure but Andrew Richardson could get little Sis's part. Speaking of Mary Jane Richardson, that she had often heard her mother say that she wanted that child to have its mother's part, and that if I could get two witnesses besides herself, that three witnesses could establish a will, so that child could get its mother's part, and you must study fast; if there is a will established it must be done in a short time; and that Harriet Lipscomb further stated, that she attended to the settling of her mother's business herself, and asked witness if she supposed she would be troubled by the creditors or witness' sons? Then Harriet Lipscomb further stated, she could tell witness of two things that she was not apprised of:

that her mother had given her half the place where she lived, near LaGrange, and a bill of sale to Mary, and upon parting at the grave of Mildred Bowling, Harriet Lipscomb requested witness and A. W. Tyre and wife to come over to her house in a few days and talk the matter over, and accordingly witness and A. W. Tyre went over to Harriet Lipscomb's house, when she (Harriet Lipscomb) appeared very distant and had nothing to say on the subject, until approached by A. W. Tyre, when she stated that she intended to attend to her mother's business herself, and that her mother gave her half the land where she lived and a bill of sale to Mary. Tyre asked her if that was all her mother gave her, when she said it was, and if he did not believe it to go to the Clerk's office and see for himself; and Tyre asked her if that was all she claimed that her mother gave her, when she said it was. Witness states, distinctly, that the above conversation, except the last one between Harriet Lipscomb and A. W. Tyre, was raised by Harriet Lipscomb; the last was raised by A. W. Tyre. I know nothing more that will benefit plaintiffs.

To the first cross interrogatory, she answers: In my conversation with Mildred Bowling she did not say that she had given the girl Mary to Harriet Lipscomb. Mildred Bowling told me, at my house in the year 1852, that all the property she paid taxes for at her death would be equally divided between Harriet Lipscomb and my children; she said that she had not nor never intended to make a will. I do not now recollect that she said any thing to me about listening to report.

To the second cross interrogatory, she answers: That the character of her children for prudence, frugality, and correctness, is not, perhaps, as good as it ought to be. Yet she thinks their character for the above traits, are as good as children are according to their opportunity. I do not know that they are extravagant, or reckless, in money matters; I do not know that they make way with all they get, as they have assisted me in raising them and providing for the family. I never knew any of them to gamble or be in the habit of gambling, any or either of them. I never saw any cards, except cotton or wool cards, such as are generally used by women in carding and spinning cotton or wool cloth, in my house. I never knew them to have any decks of cards.

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I do not know whether other people knew it or not. I do not know they are always in debt. I do not know about their indebtedness. It is true, my children are very poor and have not been able yet to make property, and, consequently, not able to have property that they were not able to buy. I have not myself seen them or known them to play cards at any time or place. I do not know that such is their character and reputation. I never expressed any wish to buy the interest of my children, except John's. I once said that if it was so that I could manage John's interest for him, I would like to do so for his interest. I did not say that I would let him have it as he needed it, but that it might do him the most good, as I thought I was older and knew better how to dispose of it than he, having more experience. I did not say that I was afraid it would be gotten away from him for nothing, that I now recollect.

To the third cross interrogatory, she answers: I am not interested in this suit; I have not expressed an intention to become so, that I now recollect. By Harriet Lipscomb's request, I went to her house, but not to seek conversations for the purpose of becoming a witness. I did not, at that time, know that there would ever be any controversy about the property; at the time, my feelings were such as a mother's feelings are usually for her children, but not altogether in favor of plaintiffs. There was no person present at the taking of these interrogatories, except myself and the commissioners; William Forbus passed through the room once since I have been answering these interrogatories, but did not remain in the room one minute. I have seen Thos. J. Bowling, William D. Bowling, and Mary Tyre, the wife of A. W. Tyre, to-day. I have not seen John Bowling since January last. The most of the conversation that has passed between us, in regard to this case, was about the interrogatories that were lost, and about preparing to re-take others in their lieu; there has nothing else on this subject, that I now recollect, passed between us. I know nothing more that will benefit the defendant.

MARY ^{her} ~~X~~ BOWLING.
_{mark.}

Answered, subscribed, and sworn to, before us this 16th day of May, 1857.

JAMES LEWIS, Commissioner, [L. s.]

BLAKELY L. HARRIS, Commissioner, [L. s.]

Martha Sample's Interrogatories taken by Plaintiffs.

To the first direct interrogatory, she answers: I do, (know the parties).

To the second direct interrogatory, she answers: I am the daughter of Mrs. Harriet Stanford, and grand-daughter of Mildred Bowling, deceased. I have heard Mildred Bowling say she never intended to make a will; that the Law would divide her property between her daughter and her grand children, Mrs. Bowling's children; I know that Mildred Bowling, at her death, owned a lot of land in Heard county, also a negro woman named Winney, about seventy years old, and worth about seventy-five dollars; Aaron, a man, aged about forty-five years, dark complexion, worth about nine hundred dollars; Margaret, a woman, about thirty-five years old, worth about seven hundred and fifty dollars; Martha, a woman of copper complexion, about twenty-one years old, and worth about one thousand dollars; Mary, a woman of dark complexion, about twenty-five years old, worth about one thousand dollars; George, a boy of dark complexion, worth nine hundred and fifty dollars; also, Green, a boy of dark complexion, aged about fifteen years, worth nine hundred dollars; Frances, a girl of dark complexion, about sixteen years old, worth about eight hundred dollars; Harriet, a girl of dark complexion, about six years old, worth five hundred dollars; Orlando, a boy, about three years old, of light or copper complexion, worth three hundred dollars; John, a boy of dark complexion, about three years old, worth three hundred dollars; and said negroes are worth, per annum, for hire, seven hundred and twenty-five dollars. The only property not above mentioned owned by Mildred Bowling, at her death, consisted of one horse, clay-bank color, worth about one hundred and twenty-five dollars; one dark bay mule, worth one hundred and thirty dollars; one buggy and harness, worth about seventy-five dollars; a small lot of household and kitchen furniture, and cooking utensils, worth about seventy-five dollars; also, a lot of stock, consisting of cows and hogs, worth about one hundred and thirty dollars; a new cotton gin, worth about seventy dollars.

To the third interrogatory, * * * *

To the fourth interrogatory, she answers: I heard Harriet Lipscomb say, in regard to her farming business, in the year

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1855, that she and her mother, Mildred Bowling, were to farm together, each one to pay their own part of the expenses, and the crop to be equally divided between them; Robert Turner was their overseer, at the sum of one hundred and fifty dollars per annum, and his wages to be paid out of the joint funds, or each to pay half the said amount. I understood Mrs. Harriet Lipscomb, now Mrs. Stanford, to say that Turner overseed for them both—herself and her mother, Mrs. Bowling. She said she had moved the property of Mrs. Bowling to her own place, because there was more house-room, and the other property was moved to the same place to have it taken care of, and for convenience; the property so removed comprised the whole of her negroes, stock, household furniture, farming utensils, &c.

To the fifth interrogatory, she answers: A short time after the death of Mildred Bowling, she heard Mrs. Lipscomb, now Mrs. Stanford, say that she believed it was Mrs. Bowling's wish that she (Mrs. Lipscomb) should keep the negroes together, sell them off as she saw proper, and pay off the Bowling children in money, as she thought they needed it. Witness said to her that the Bowling children would not stand to that; that they would go to law first; she replied that it would take money to go to law. I have heard Mrs. Lipscomb, now Mrs. Stanford, say that they had sent for Charles Mabry, Esq., to come down and make a will for her to dispose of her property, but that she was sorry that they never attempted to make any will.

The conversation came up by reason of a question asked by witness of Mrs. Lipscomb, whether Mrs. Bowling had made a will, to which Mrs. Lipscomb replied, she had not made a written will; I do remember it distinctly; I have stated all that I know that will benefit the plaintiffs.

To the six interrogatory, she answers: That Mildred Bowling could not write her name; witness knows that she could not, because Mrs. Bowling made her mark, and had frequently requested witness to learn her to write; she was about seventy-one or two years old at her death.

Cross Interrogatories.

To the first cross interrogatory, she answers: That she heard Mrs. Bowling say that some of her family had given all of her property to one child, but she never heard her say

that it run in the family to do so; I have heard her say often she would like for her negroes to be kept together, if it could be so; I have heard Mrs. Bowling say that what she gave to the Bowling children during her life would be in money. I have looked upon the attached paper; it is my hand-writing, and I did hear Mrs. Bowling say what she is there represented to have said.

To the second cross interrogatory, she answers: Mrs. Bowling's negroes were at my mother's plantation in the life-time of Mrs. Bowling; they were sent there by Mrs. Bowling, and they lived there and worked my mother's land, as I understood and knew, in partnership between them; I knew, of my own knowledge, that Mrs. Bowling did claim said negroes, and that she laid in a part, if not all, the provisions for said year. Witness is of opinion that she furnished amply enough. I do not know in whose possession said negroes were.

To the third cross interrogatory, she answers: I did hear my mother, Mrs. Lipscomb, say, after the death of Mrs. Bowling, that she had given her the negroes, and that she would have kept them together; I heard my mother say that Mrs. Bowling had given her the negroes, and sent them to her plantation, and that Mrs. Bowling had delivered them to her, &c.

To the fourth cross interrogatory, she answers: I have, in my answer to the third interrogatory, fully answered this question, I now here repeat. I have heard my mother say that Mrs. Bowling had given her the negroes, and sent them to her plantation, and delivered them to her, and they were in her possession or on her plantation before Mrs. Bowling's death.

To the fifth cross interrogatory, she answers: (Ruled out.)

To the 2d fifth interrogatory, she answers: My answers have been taken in this case before, and I am correctly represented as saying that Mrs. Bowling said it did not run in her family to give all to one child; I do not recollect that I ever said that Mrs. Bowling paid for half the place on which my mother is now living; do not know that Mrs. Bowling ever paid anything for it; do not know that Mrs. Bowling's notes were given for any part of it; I have heard my mother say that Mrs. Bowling's notes were given for half the place.

To the sixth cross interrogatory, she answers: I have

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stated all I know going to show Mrs. Bowling (in the conversation enquired about) gave her negroes to my mother, and that they were on my mother's place, and in her possession before Mrs. Bowling's death, and have related all that I know that will benefit the defendant.

The evidence being closed, the Jury returned a verdict in favor of the plaintiff for the sum of five thousand two hundred and fifty dollars.

Counsel for the defendant then moved for a new trial in said case, on the following grounds:

1. Because the Court erred in holding that hire of the negroes in dispute, accrued since the commencement of the suit, was recoverable in this action, and in admitting the evidence on this subject.
2. Because the Court erred in holding that the increase of the negroes, and the increase in value since the commencement of this suit, and the accrual of the cause of action was recoverable in this form of action, and in admitting the evidence on this subject.
3. Because the Court erred in admitting in evidence the returns made by the administratrix after the commencement of this suit, and the original vouchers accompanying said returns.
4. Because the Court erred in admitting to the Jury the declarations of Mildred Bowling as to her intention not to make a will, and all the evidence of each party thereof, in relation to her dying intestate, and what her father did with his property, and all the declarations as to the distribution of her property at her death.
5. Because the Court erred in excluding from the Jury the statement of Mildred Bowling, as shown by the certificate of the witness, Martha A. Samples, drawn up by the witness and adopted by her as part of her answer: and erred in allowing the balance of her answer on that subject to be read, and excluding that.
6. Because the Court erred in excluding from the Jury the answers of the witness, Martha A. Samples, to the four last cross interrogatories.
7. Because the Court erred in excluding from the Jury the statement of Mildred Bowling and the evidence of Noah Lee, and the other evidence going to show the amount of money advanced to the father of the plaintiffs, and the injury sus-

tained by Nathan Lipscomb in becoming the security for John W. D. Bowling, the father of the plaintiffs.

8. Because the Court erred in admitting the evidence of Forbus, and all the other evidence of declarations by Mrs. Bowling and Mrs. Lipscomb, or either of them, of an *intention to farm together* in 1855.

9. Because the Court erred in admitting the evidence of John W. Bellah, in relation to the sale of the gin; and the evidence of Harris and others in relation to the purchase of a carriage.

10. Because the Court erred in charging the Jury, that if they believed the negroes were the property of Mrs. Bowling, and had not been returned by Mrs. Lipscomb, as her administratrix, but claimed and used as her own, that then this action was maintainable for them, and they must return for the plaintiffs one-half the proven value of the same, and one-half the proven value of the hire.

11. Because the Court erred in charging the Jury as it charged, and in holding this action was maintainable under the facts proven.

12. Because the Court erred in charging the Jury that the declarations by Mrs. Bowling of an intention to give the negroes to Mrs. Lipscomb, and, also, the declarations that she had given them, were not sufficient to prove a gift in Law.

13. Because the Court erred in charging the Jury, as requested by plaintiffs' counsel, "That, when a witness testifies to facts incoherently, or inconsistently, that circumstance goes to the credibility of the witness; and if the manner is very incoherent, or inconsistent, the testimony should be considered with great caution."

14. Because the Court erred in charging the Jury, as requested by plaintiffs' counsel, "That if the Jury should be of the opinion that Mildred Bowling, being an aged woman, lived with her daughter, Harriet Lipscomb, and that said Harriet Lipscomb managed her business affairs for her, then even if they should be of the opinion that said Harriet, as such, was in possession of the negroes, that fact is consistent with the title of Mildred Bowling, and her possession was the possession of her mother-in-law."

15. Because the verdict of the Jury was contrary to the charge of the Court, in this, to-wit: The Court charged the Jury that, if Mrs. Bowling delivered the negroes to Mrs.

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Lipscomb in her life-time, with the intention to give them to her, they must find for the defendant, as this gift or no gift was the question here involved: and that, if Mrs. Bowling directed Mrs. Lipscomb to send and get the negroes with intention to give them, and she did send and get them, this was as good a delivery as if she had taken them by the hand and turned them over to her, saying: "Here, take these negroes; I give them to you"—the defendant insisting that this delivery was clearly proven, and no evidence contradictory was introduced or offered.

16. Because the verdict of the Jury was contrary to Law, there being no evidence that the defendant had violated the Law in any particular, or had ever failed or refused to account with plaintiffs for anything.

17. Because the verdict of the Jury is contrary to evidence and Law, and strongly and decidedly against the weight of evidence.

18. Because the verdict of the Jury is contrary to the evidence on the subject of value, and is excessive.

Upon hearing this motion for a new trial, the presiding Judge overruled the same on all the grounds taken, except the eighteenth and last ground, and overruled the motion on that ground also, provided that the counsel for the plaintiff shall, within ten days, write off from the amount of damages rendered by said verdict, all the excess above the sum of three thousand two hundred and seventy-one dollars and ninety-one cents, and on his failure so to do, the said Judge ordered that the verdict be set aside and a new trial be had.

This decision of the presiding Judge was excepted to, and brought up by both parties.

The defendant excepts, because the Court refused to dismiss the action, and because of the refusal of the Court to grant a new trial upon all the grounds taken in the motion.

The plaintiff excepts, because the Court granted a new trial, unless the damages should be remitted, as before stated, and because during the trial of said case, John Motley, being a witness on the stand, proved the value of the slaves in controversy at the time of the conversion, and was then questioned by plaintiff's counsel as to the increased value of certain of the slaves at the date of the trial, and on cross-examination, defendants' counsel asked the witness and proposed

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to prove by him the depreciated value of certain others of the slaves, which the Court allowed, against the objection of plaintiff's counsel.

E. Y. HILL, N. M. HARRIS & B. H. BIGHAM, for the plaintiff in error.

B. H. HILL & C. W. MABRY, for the defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

The record in this case is very voluminous, and it presents exceptions to different rulings of the Court by each party.

We will consider, first, the exceptions taken by the defendant in the Court below, and as each party is both plaintiff and defendant in error, we shall designate them by their positions, respectively, in the Court below.

1. The defendant excepts, *first*, on the ground that the Court "erred in not dismissing the action." We have searched the transcript, in vain, for evidence that any distinct motion was made to dismiss the cause before it had been submitted to the Jury. The 10th and 11th grounds of the defendant's motion for a new trial, impute error to the Court, in having charged the Jury, that in this form of action, and under the proofs, a recovery could be had for the value of the negroes in dispute, and their hire. This is the only trace we find in the record of exception made to the form of the action in the Court below. The plaintiff was evidently proceeding under the second section of the Act of January 15th, 1852, entitled: "An Act to regulate the mode of suing the bonds of Executors, Administrators and Guardians."

In this action, it has been attempted to inquire into advancements made, during her life, by the intestate; and the principal object was to try the title to certain slaves, of which plaintiff maintains that the intestate died seized and possessed, and which are in the hands of the defendant, as administratrix, but which the defendant insists are her own property, by gift from the intestate. We strongly incline to the opinion that the remedy given by the second section of the Act of 1852, is applicable, and was intended by the Legislature to be applied, only, to matters of account between the representatives of deceased persons and their legatees or

distributees—or between guardians and their wards. Where the claim of the plaintiff is based upon the returns of the defendant to the Ordinary, impeached only by such surcharging of particular items, improperly introduced, or omitted, or overcharged, or undercharged, as may be conveniently set forth in the assignment of breaches of the bond, the remedy may be sufficiently appropriate; but when attempted to be used to try title to slaves, between the deceased and his representative, or to adjust unequal advancements, made by the deceased to his children or grand-children, we think it due to the General Assembly to suppose that the attempt goes beyond their contemplation.

Presented as the exception is, in this case, and weakened by a consent equivocal in its terms, and differently understood by the opposing counsel, but clearly embracing the speedy decision of *the contested claim to the slaves*, we will not, on this ground, reverse the judgment.

The next exception, taken by the defendant, is, that the Court erred in overruling his motion for a new trial upon all of the grounds presented in the motion; and this brings them under review.

In his argument before this Court, defendant's counsel abandoned the first, second, third, fifth, sixth, eighth and ninth grounds. The tenth and eleventh (referring to the charge of the Court touching the sufficiency of the remedy,) have been disposed of in considering the first exception. The fourth ground is error of the Court in admitting the declarations of Mildred Bowling (the defendant's intestate,) of her intention not to make a will, and in regard to what her father did with his property, and all her declarations as to the disposition of her property at her death.

Throughout the trial of this case, the door for the admission of evidence was certainly very widely opened for the benefit of both parties. The tendency in the progress of jurisprudence has been to relax greatly the stringent rules of evidence to be found in the books, and this Court has already gone far to sanction this relaxation. Touching the precise question now under review, two of the Court are of opinion that the evidence was properly admitted, whilst the third, holding that it, with much of like character, might well have been excluded, deems it too immaterial—of too light a character—to warrant the supposition that it influenced

the finding of the Jury, or to justify a reversal of the judgment.

The seventh ground assigns as error, the exclusion of the declarations of the intestate, and other evidence, going to show the amount of money advanced to the father of plaintiffs, and the injury sustained by Nathan Lipscomb, in becoming the security of John W. D. Bowling, the father of the plaintiffs.

There is nothing, whatever, in the pleadings, or in the consent, referring to advancements. If the defendant desired to have advancements adjusted, she should have either demurred to the action or pleaded them specially.

Who Nathan Lipscomb was, or how his injuries, resulting from his securityship for the deceased father of plaintiffs, is connected with the distribution of Mildred Bowling's estate, the record does not disclose, and this ruling of the Court seems to be quite right.

2. The thirteenth ground is, that the Court erred in charging the Jury, as requested by plaintiff's counsel, "That, when a witness testifies to facts, incoherently or inconsistently, that circumstance goes to the credibility of the witness; and if the manner is very incoherent, or inconsistent, the testimony should be considered with great caution." We regard this charge as equally consonant with reason and with Law.

All of the other errors, alleged by defendant's counsel against the charge of the Court, and against the verdict of the Jury, except the eighteenth and last, (in which the Court sustained them,) may be resolved into this question—

Is the verdict of the Jury sustained by the Law and the evidence?

It must be borne in mind that the great question in the case is, as to the liability of the defendant Lipscomb, in her character of administratrix, for the value and the hire of certain slaves. Plaintiffs allege title in the intestate at the time of her death. Defendant sets up title in herself, by gift from the intestate.

Plaintiffs prove possession of, and property in, certain slaves, by the intestate, in and near the close of the year 1854, she having died early in the year 1855. About this there is no dispute. Plaintiffs, also, proved the value and the hire of the slaves, and then closed their case.

Defendant put in evidence declarations of intestate, of her

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intention to give, and of her having given, the slaves in dispute to the defendant, and also evidence as to delivery.

The declarations of *intention* to give, we put out of the question, as amounting to nothing.

The declarations that she had so given the slaves, were proven by four or more witnesses; but they were of the most general character, indicating neither time, nor place, nor manner, nor witnesses to the fact. All the circumstances clearly indicate that the gift, spoken of by intestate as having been made, was unaccompanied at the time of making it, by any delivery, actual or symbolical.

In *Anderson & Wife vs. Baker*, 1st *Geo. Reports*, 595, this Court held that, "to constitute a valid parol gift of a chattel, there must be an *immediate* delivery of the same by the donor to the donee." And again, "The bare declaration of the donor, that she had given certain negroes to the donee, is not sufficient to pass the title to the donee without evidence of *some act*, from which the Jury may presume a delivery of the property where the donor remains in possession of the property, exercising dominion over it until her death."

In *Carter & Wife vs. Buchannon*, (which was Trover for a slave,) 3d *Geo. Reports*, 513, this Court held, that "Declarations of the donor, made on the evening of the same day on which the alleged gift was made, but after it was made, to show that there was a gift, and the manner of it, are not admissible as parts of the *res gesta*," and justified the rejection of such evidence in proof of a gift.

How much less, then, are declarations of the donor admissible to prove the gift, which were made, we know not how long, after simply stating the gift, but not the manner and form of it?

The Court say, on page 517: "It is well settled that the acts of the party, or the facts, or circumstances, or declarations, which are sought to be admitted in evidence, are not admissible, unless they grow out of the principal transaction, illustrate its character, and are contemporary with it."

In both these cases, numerous authorities were cited and well considered. When we consider the great value, in Georgia, of negro property, and the facility of proving parol gifts by general declarations of the donor, (often made playfully or inconsiderately,) it is a subject of congratulation that

this Court, at an early day in its history, adopted stringent rules touching the proof of parol gifts. But these rules will avail nothing, unless rigidly enforced.

3. We hold, then, the general rule to be, that there must be, to constitute a valid parol gift of a chattel, an actual delivery of the chattel, *at the time of the gift*, accompanied by words characterizing the act as a gift—and further, that the act and the words spoken must be such as to signify clearly the transfer of dominion over the chattel from the donor to the donee. Such, we say, is the general rule; whether or not there may be declarations and circumstances, not precisely contemporaneous, but equivalent, as to intention and transfer of dominion, we leave to be determined as cases may arise. In this case we hold, that the *mere* declarations of the alleged donor, that she had given, &c., are insufficient to establish the gift.

4. But it is insisted that there was an actual delivery of the slaves in dispute, posterior to some of the proven declarations of the donor, that she had given, &c., and prior to other declarations of the same party of like import. These prior and posterior declarations, it is insisted, connected with the intermediate delivery, bring the case within the rulings of the Court—make a case equivalent to that involved in the general rule.

To that proposition we assent, with this qualification: that, as the act of delivery relied upon was characterized by no contemporaneous words, the subsequent possession by the donee must be such as to show an abandonment of dominion by the donor, and its acquisition by the donee. The proof of delivery was briefly this: that the alleged donor directed her overseer, so soon as the crop of 1854 was gathered, to notify her of it, for “she wanted to deliver the negroes to Mrs. Lipscomb;” that, having gathered the crop, he afterwards notified her of it, and a boy, lured by Mrs. Bowling, came with Mrs. Lipscomb’s cart and took the negroes away. He afterwards saw them on Mrs. Lipscomb’s plantation. Other witnesses testify to having seen them there. Now, as the validity of this gift confessedly hangs upon the question of delivery, the character of the possession, acquired through it by the defendant, should be closely scrutinized.

Plaintiffs offered rebutting evidence to this point.

There were four witnesses, viz: Brittain, Harris, Edwards

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and Forbus, who testified to conversations with Mrs. Bowling and Mrs. Lipscomb, both present and participating, in which they spoke of an arrangement, made between them, to farm together, on Mrs. L.'s plantation, in the year 1855. Two witnesses, viz: Mary Bowling and Martha Samples, testify to similar declarations, made to them by Mrs. L. alone. These conversations occurred about the last of 1854, or first of 1855. Some of these witnesses give the details of the arrangement as stated by the two, or by the defendant, and amongst them were these: that they should furnish, each, about an equal number of hands, about an equal amount of provisions, should contribute equally to bear the expenses, and equally divide the profits. The witnesses Ridley, Pharr, Bowling and Samples also testify to sayings of the defendant, shortly before and shortly after the death of the intestate, relative to these slaves, not at all reconcilable with the idea of title to them in herself.

This testimony was all before the Jury; their verdict shows that they considered the transaction relied upon as a delivery, not consistent with an abandonment of dominion by the intestate, and an acquisition of it by the defendant. We think the rebutting evidence fully justifies their conclusion, and will not, therefore, set aside their verdict as against the Law and the evidence of the case. This disposes of the defendant's exceptions.

The plaintiffs except to the Judgment of the Court, *first*, because the Court granted a new trial, unless a certain sum be remitted from the damages, which were deemed excessive. After a careful review of the evidence, we agree with the Judge below, and for the reasons stated by him, that the damages were excessive to the extent of the sum required by him to be remitted.

Plaintiffs except, *secondly*, that the Court erred in permitting the defendant to show that some of the slaves had depreciated in value since the conversion, after the plaintiffs had proven an appreciation in value of others, since the same event.

We sustain this ruling, for the reason that our practice allows in Trover an alternative verdict, as regards the value of the slaves; that is to say, a verdict assessing, separately, in the damages the *value* of the slaves, to be avoided by delivering the slaves to the plaintiff, within so many days; and

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this form is almost invariably adopted. But defendant has not the privilege of retaining some, and delivering others, of the slaves; he must deliver all of the slaves, or pay all of the money. In this view, as well as in a general view of the subject, the Jury should have evidence of the value of all, at any time, when the value of some was proven.

Finding no error in the numerous rulings of the Court, we affirm the Judgment.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed, and that the plaintiffs be allowed, until the last day of the next Term of the Superior Court of Troup county, to remit from the amount of damages, found by the verdict, the sum stated as excess by the Court in the Judgment upon the motion for a new trial.

RAINEY *vs.* JONES.

Where the defendant has fully denied all the Equity of the Bill is solvent and able to respond to any duty or damages, which may be imposed, and there is nothing peculiar in the facts of the case, this Court will not overrule the discretion of the Circuit Judge in dissolving the injunction.

In Equity, in DeKalb Superior Court. Decision by Judge BELL, at the October Term, 1859.

John G. Rainey filed his Bill in Equity, in DeKalb Superior Court, against Charles M. Jones, in which bill the complainant alleges:

That Baker & Willcox obtained a judgment, in DeKalb Superior Court, against the complainant, for the sum of two hundred and forty-five dollars and forty-six cents, besides interest and costs; that a fi fa issued from said judgment, and was levied upon lot of land number two hundred and

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eighty-one, in the eighteenth district of said county, containing two hundred two and one-half acres, as the property of the complainant, and which did in fact belong to him; that the defendant, Charles M. Jones, then lived near to the complainant, between whom and complainant there had been considerable dealings, and then existed mutual accounts; that the said Charles M. Jones was indebted to the complainant the sum of four hundred and twelve dollars and forty-three cents, for goods, lumber, money and other things, sold and delivered, loaned and furnished by the complainant to the said Jones, at his special instance and request: that complainant does not know, and has no means of knowing, the amount of his indebtedness to said Jones: that the complainant's said lot of land was advertised by the Sheriff for sale, on the first Tuesday in May, 1857, and being unable at the time to pay off the fi fa, and save his property from sale, and confiding in the said Jones, as his friend and neighbor, it was agreed by and between the said Jones and the complainant, that said Jones should furnish the money and bid off said land, and that, on a settlement had between the parties, the said Jones should reconvey the land to complainant; that, pursuant to said agreement, the said Jones did bid off said land for the complainant's benefit, and did pay off all of said fi fa, except about thirteen dollars, which was furnished by complainant; that said land was bid off by said Jones, at the sum of four hundred and five dollars; that, on the day of said sale, the said fi fa amounted to the sum of two hundred and eighty-one dollars and five cents, all of which, except the said sum of thirteen dollars, was paid by the said Jones to John M. Fowler, Sheriff—the balance of his bid over and above the amount of the fi fa, the said Jones never did pay to the Sheriff or any one else, but, at the request of the said Sheriff, the complainant gave his receipt for said balance of the said bid, simply, that it might appear that the bid was correctly disposed of, but complainant never did actually receive the money, nor was it ever paid; that complainant and said Jones told said Sheriff that the matter was all understood between them, and the said Sheriff executed a deed to said Jones for said land, on or about the sixth day of May, 1857; that said lot of land, at the time, was well worth the sum of thirteen hundred dollars; that complainant is now, and has always been ready to come to a full and fair settle-

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ment with the said Jones, and pay him any balance which may be due to him on such settlement, when the sum is ascertained; that the complainant has remained on said land ever since the said sale, without molestation or demand of rent by the said Jones, and believed that said Jones would come to a settlement with him, and faithfully carry out said agreement about said land, but recently complainant has found, to his surprise, that the said Jones is fraudulently intending and endeavoring to deprive complainant of his home, by denying the agreement aforesaid relative to said land, and by neglecting and refusing to account and settle with the complainant; that the said Jones has instituted an action of Ejectment in the Superior Court of said county against the complainant for the recovery of said land, and has also commenced an action in the Inferior Court of said county against the complainant on a promissory note, which action has been carried to and is now pending on the appeal in said Superior Court, and is unjust and inequitable until the settlement aforesaid is had between the parties; that the complainant cannot set up the agreement aforesaid in a Court of Law, so as to bar a recovery against him in said action of Ejectment, and cannot have full and adequate relief in the premises, except in a Court of Equity.

The complainant, by his bill, prays: That the said Jones may come to an account with him; and that he may discover, on oath, the facts respecting the said agreement; and that an injunction may issue, restraining the further prosecution of said action of Ejectment and the said action on the said note, until the hearing of his said bill.

The injunction prayed for was granted.

On the 29th of March, 1859, the defendant, Jones, filed his answer to the complainant's bill, in which he admits: That the *fi fa* in favor of Baker & Willcox was levied on the land, as charged, but denies that the land belonged to complainant, or that he had any title or right to the same, except a bond for titles, made and executed by Robert M. Rainey, which bond was conditioned to make titles when the purchase money was paid, for which purchase money the said Robert Rainey held complainant's notes, on which nothing was ever paid by the complainant: that on the day said land was sold, and after the defendant had bid it off, the complainant delivered said bond for titles to defendant, who then

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learned, for the first time, that complainant had no title to said land; that the defendant carried said bond for titles to the said Robert M. Rainey, and paid to him the notes of complainant for the purchase money, amounting in all to the sum of five hundred and sixteen dollars, and the said Robert M. Rainey then took up said bond and made to the defendant a warranty title for said land. The answer admits, that defendant and complainant lived near each other, but denies positively that, at that time, or at any other time, from the 13th of March, 1857, to the said sale-day, there were any accounts between complainant and defendant, or that there was to be any settlement between them; that, on the said thirteenth day of March, 1857, the complainant and defendant had a full and complete settlement of all accounts between them. and that on the day said land was sold, the defendant did not owe complainant one cent by account, note, or otherwise, but that he, then, held notes on complainant for more than one hundred dollars; that all the items of indebtedness mentioned in, and annexed to, the complainant's bill, were included in and settled by the reckoning on the said 13th of March, 1857; that the items of said account, dated since that time, were likewise settled, at a reckoning between the complainant and defendant, had at the house of John T. Flowers, on the twenty-eighth day of January, 1859, upon which last settlement of accounts, the defendant was due to complainant the sum of one hundred and five dollars, which amount, it was then and there agreed, should be entered as a credit on the note sued on in the action aforesaid, and which credit the defendant, afterwards, entered on the same. The answer admits, that it is probable the complainant was unable to raise the money to save said land from sale, but denies positively that the defendant ever agreed to bid off said land for the benefit of complainant, and that, upon an accounting and settlement between the defendant and complainant, the land should be re-conveyed to complainant; but, on the contrary, while the sale of the land was going on, complainant came to the defendant and asked him to bid for and to buy the land, even if it should go to a thousand dollars, and that he should have his own time to pay whatever surplus might remain after paying off said *fi fa*, and the defendant is informed, and believes, that complainant made the same request of and proposition to others, who bid for the land with that

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understanding. The answer admits, that defendant bid off the land, at the sum charged, and that the fi fa amounted to about the sum charged, but positively denies that complainant furnished thirteen dollars, or any other sum of money, to aid in paying off the fi fa; that the complainant did on that day pay the defendant thirteen dollars, which he owed him for that sum loaned to him a few days before said sale, and that, when it was paid, nothing was said about it being paid or furnished for the purpose of paying off the fi fa. The answer admits, that the defendant only paid to the Sheriff the sum due on the fi fa, and as there was no other fi fa in the Sheriff's hands, the defendant and complainant expressly agreed that the surplus of ninety-eight dollars and forty-two cents should go in payment of a note, held by defendant against complainant, for ninety-five dollars, besides interest and cost, which note was produced in the presence of the Sheriff, and was satisfactory to complainant, who gave the Sheriff a receipt for the said surplus, remarking that he did not then have time, but that he the complainant and defendant could meet in a day or two and arrange the matter with themselves. The answer also admits, that the Sheriff executed to defendant a title-deed for the land, but denies that, at that time or previous to the sale, there was any understanding or agreement that the land should be reconveyed to complainant. The answer denies that the land was worth thirteen hundred dollars, or that it was worth more than eight hundred dollars; the answer denies that defendant has allowed complainant to remain on the land, without accounting for rent, but alleges that he has made every effort to get complainant off the said land; that he tried to get possession of the land by virtue of his purchase at Sheriff's sale, but the Sheriff failed to put him in possession whilst he remained in office; that he tried to get the possession of the land by possessory warrant, and was legally necessitated; that complainant has one day been promising to give defendant the possession of the land, and at another threatening to kill the man who takes possession of the same; that, after other means failed, he brought the action of Ejectment aforesaid: the answer admits the bringing suit on the promissory note, but denies that it is unjust or inequitable: the answer alleges that complainant agreed to rent said land, and cultivate ten acres thereof in cotton—and that, until the filing of the bill.

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defendant thought that complainant was satisfied with all the arrangements and settlements made as aforesaid.

Upon the coming in of the answer, a motion was made by defendant to dissolve the injunction on the ground that the facts and circumstances, upon which the equity of the bill was based, were distinctly and positively denied by the answer.

The presiding Judge sustained the motion, and dissolved the injunction.

Error is assigned upon this decision of the Judge.

GARTRELL & HILL, for the plaintiff in error.

MURPHY & CANDLER, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Had the Court concluded to retain the injunction in this case, we would not have felt constrained to control the discretion of the Circuit Judge; deciding, however, to dissolve it, it is not, in our judgment, such a flagrant abuse of discretion as demands the interference of this Court.

It is not pretended but that Jones is solvent and able to respond to any duty or damages, which may be imposed upon him; and having confessedly denied all the equity in the bill, we see no sufficient reason for restraining him from prosecuting his legal rights in the appropriate forum.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

COLLIER vs. PERKERSON et al.

1. Mistake of Law is a good defence against an action to recover money, under a contract of purchase, where there is a full knowledge of all the facts, *provided*, the mistake be clearly proven, and the plaintiff cannot, in good conscience, receive the money sued for.

2. This defence is available (the proofs being clear and indisputable,) in an action brought by a Sheriff for the use of a defendant in execution against the first purchaser at a Sheriff's sale, to recover the difference in amount between the first and second sale, under the Act of the 27th December, 1831. *Cobb's Digest*, 513.

Debt, in Fulton Superior Court. Tried before Judge BULL, at the April Term, 1860.

This case came up and was heard, upon the following state of facts, to-wit:

On the 18th day of July, 1854, Patterson M. Hodge executed and delivered to Meredith Collier a mortgage deed for "City Lot, No. 49, in block number 2, in the city of Atlanta, being part of lot of land No. 51, in the 14th district of originally Henry, then Fulton county, which city lot fronts on Ivey street, and containing one-half acre, more or less," for the purpose of securing the payment of a promissory note, made by the said Hodge, payable to said Collier or bearer, dated the 18th of July, 1854, and due one day after date, for six hundred dollars. The mortgage was duly recorded in the Office of the Clerk of the Superior Court of Fulton county, on the 1st day of August, 1854.

After the date of the mortgage, Thomas W. Connally, as administrator of Cornelius M. Connally, deceased, recovered several judgments, in a Justice's Court, of said county of Fulton, against the said Patterson M. Hodge, as principal, and Ambrose B. Forsyth, as security.

From these judgments *fi fas* were issued and levied upon the mortgaged premises, as the property of the said Hodge.

When the property was exposed to sale by the Sheriff, notice was publicly given that the same would be sold, subject to the mortgage lien of the said Collier, and at the sale, the said Collier, being the highest and best bidder, the property was knocked off to him, at the price of nine hundred and thirty-one dollars.

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Immediately after the property was knocked off, the said Collier stated, that he had bid for the same under a mistake; that he thought that the money arising from the sale would first be applied to the payment of the sum due on his mortgage, and the balance to the judgment creditors, but upon being informed that he could claim no part of the money on his mortgage, he declined taking the property, and stated to the Sheriff that he could sell it over again, as he, Collier, had bid for it under a misapprehension of his rights.

The property was forthwith sold again, and purchased by Willis Carlisle, at and for the sum of three hundred and seventy-five dollars.

The second sale occurred before the Sheriff left the block, and before any of the bidders had gone away from the place of sale, the only bidders being the said Collier and Carlisle, and the only bid made at the second sale being that made by Carlisle, who was the brother-in-law of said Hodge.

Thomas J. Perkerson, then Sheriff of Fulton county, instituted an action of Debt in the Superior Court of said county, to recover, for the use of the said Hodge, the difference between the amounts of the first and second sale.

On the trial of said action, the plaintiff introduced the *fas*, with the levies on the lot, and also proved the regular advertisement of the sale, and that the two sales occurred, and that the property was bid off, first by Collier, and secondly by Carlisle, as before stated, and that the notice and statements were made by Collier, as to his mortgage, which are herein before detailed, and closed his case.

The defendant, Collier, then offered in evidence the note and mortgage aforesaid, his counsel stating at the same time that he was prepared and expected to prove that the property sold for its full value, taking the amount of the mortgage into consideration; and that, so soon as the said Collier was informed by an Attorney that he was bidding under a misapprehension, he did not make another bid, and that the said Willis Carlisle, the other bidder, was also laboring under the same mistake, and that so soon he was informed of the mistake, he did not make another bid.

The Court below rejected the mortgage, and refused to allow the defendant to make the proofs thus offered and proposed to be made, and the defendant excepted.

The defendant then moved the Court to continue said case.

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for the purpose of enabling him to file a Bill in Equity, to relieve himself from the mistake so made, as aforesaid, stating to the Court that he was prepared to prove that he bid at said sale under a misapprehension of his legal rights, and that the said Hodge, for whose use the action was brought, had sustained no damage by the defendant's failure to take said property at his bid, because the same brought its full value at the second sale, being sold subject to his mortgage.

The Court overruled the motion and refused the continuance, holding that the defendant was not entitled to any relief in Equity, from the facts stated; to which ruling and refusal the defendant excepted.

The evidence being closed, the Jury, after receiving the charge of the Court, returned a verdict in favor of the plaintiff, for the sum of five hundred and fifty-six dollars, with costs of suit.

The defendant assigns error upon the several rulings and decisions of the Court, and seeks, by the writ in this case, a reversal of the same.

EZZARD & COLLIER, for the plaintiff in error.

J. M. & W. L. CALHOUN, for the defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

This action was instituted under an Act of the General Assembly, approved December 27, 1831, entitled: "An Act defining the liability of purchasers, at Executor's, Guardian's, Administrator's and Sheriff's sales, when they refuse, or fail to comply with the terms of such sales."

The defence set up was, that the defendant bid off the property under a mistake of Law, as to his rights. In support of his defence, the defendant offered proof that he and the only other bidder both bid under the impression that the proceeds of the sale would be applied first to the satisfaction of defendant's mortgage—the lien of which was older than that of the judgment under which the Sheriff sold the property, but which had not then been foreclosed—and afterwards to the satisfaction of the judgment. He did not know (though he and all present were cognizant of the existence and the superior lien of his mortgage) the legal consequence of his

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bid would be, the payment of the full amount so bid, to be appropriated, first, to the satisfaction of the judgment creditors' demand, and then to the uses of the defendant in execution, leaving him, as his only means of satisfying his mortgage, recourse upon the very property which he had already purchased at its full value.

The Court refused to receive this evidence, and also refused to continue the cause, that he might seek redress in Equity. And to these rulings, denying him relief in either jurisdiction, defendant excepted. The refusal to continue, with a view to change of jurisdiction, was proper, for the reason that, if plaintiff's claim was unfounded, defendant's remedy at Law was ample.

But was the Court right in denying his defence in the action pending?

It was argued with much earnestness that the terms of the Statute are positive—that liability to pay the difference between the amounts of the first and second sales, is the inevitable consequence of failure or refusal to pay the purchase money of the first sale. The use in this action is the defendant in execution—the previous owner of the property, the plaintiff in execution, having been satisfied by the resale. Suppose, instead of the defence here set up, the defendant had pleaded and proven that he had been induced to bid for the property more than its value, by false and fraudulent representations of the plaintiff's usee, regarding the property, its location, the improvements upon it, or other elements of value. Surely, in such a case it would not be insisted that in legislative intentment the plaintiff should take advantage from his own wrong. Then there is no such inevitable consequence resulting from the Statute. The intention of the Legislature was to give a more summary remedy in such cases, not to make contracts entered into at such sales more sacred than all others.

The only remaining question, then, is, whether mistake of Law, the facts being clearly understood, is a good defence to an action brought to enforce a contract. The principle involved has been settled by this Court.

In the case of *Culbreath vs. Culbreath*, 7 *Geo. Reports*, 64, it was decided, that "money paid by mistake of Law, may be recovered back, in an action for money had and received, where there is a full knowledge of all the facts; *pro-*

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cided, the mistake is clearly proven, and the defendant cannot, in good conscience, retain it." The same principle, precisely, pervades the following proposition: Mistake of Law is a good defence against an action to recover money under a contract of purchase, where there is a full knowledge of all the facts; *provided*, that the mistake is clearly proven, and the plaintiff cannot, in good conscience, receive the money.

There was, in the case before the Court, a full knowledge of all the facts at the time of the sale. The defendant, at the trial, took upon himself the onus of proving the mistake clearly; and this done, the inference would be irresistible that the plaintiff could not, in good conscience, receive the money. The defendant offered to prove that the price paid for the land on re-sale, (of which the plaintiff received the benefit) added to the sum due upon defendant's mortgage, would make an amount about equal to defendant's final bid at the first sale, and fully equal to the value of the property. The property was sold subject to defendant's mortgage: when, therefore, the property shall have been again sold to satisfy the mortgage, plaintiff will have realized its full value. Should he in this action recover the difference between the two sales, in amount, he will thus (according to the case made in the record,) take from defendant all that is due him upon the mortgage. Can he do so in good conscience? We say not that defendant is entitled to a verdict, or that the verdict rendered was wrong. That must depend upon the proofs made. But, believing that this case is within the ruling in *Culbreath vs. Culbreath*, we hold that the Court below erred in ruling out defendant's evidence, thereby denying him his defence, and for that reason reverse the judgment.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, because the Court erred in rejecting evidence, offered by the defendant, to show that he had purchased the property for which he was sued under a mistake of his legal rights: and in holding that such mistake, if clearly proven, could not avail him as a defence in this action, and, further, that the judgment and verdict in the Court below be set aside, and a new trial ordered.

*Roseberry vs. Roseberry.***ROSEBERRY vs. ROSEBERRY.**

1. An order of Magistrates, or of a Magistrate, before whom a possessory warrant is returned, dismissing the warrant, without any reason stated in the order, or appearing in the record, will not be regarded as an adjudication of the right of possession in favor of the defendant, but as a non-suit, or dismissal in the nature of a non-suit.
2. It is the duty of the Magistrate, or Magistrates, trying such a case, (unless it be dismissed on motion of plaintiff's counsel, or by reason of some defect, or informality, without a decision on the merits,) if they find from the evidence, that the property in dispute was last in the peaceable possession of the defendant, to give judgment in his favor, order the property to be delivered over to him, upon his compliance with the requisitions of the Statute.
3. If it appear that father and son live together on the premises of the father, where there are, also, certain slaves, previously the property of the father, and in his exclusive possession, but placed by him under the control and management of the son; and if he, capriciously, leave the premises, taking the slaves with him, the father is entitled to the restitution of them under a possessory warrant.

Possessory Warrant, in Newton Superior Court. Tried before Judge CABANISS, at the March Term, 1860.

The record in this case exhibits the following state of facts, to-wit:

On the 10th day of February, 1860, Richard Roseberry obtained a Possessory Warrant against Robert Roseberry, to obtain the possession of four negro slaves, to-wit: Malissa, a woman, about 24 years old; Nancy, a woman, about 22 years old; Jesse, a boy, about 16 years old: and Esther, a girl, child of Malissa, about 4 years old.

On the 14th of February, 1860, the case came before J. W. B. Summers, B. F. Carr, and P. Reynolds, Justices of the Inferior Court, for a hearing, when the said Justices passed the following order (Justice Reynolds dissenting,) to-wit: "On motion of counsel, ordered that the Warrant be dismissed, after the testimony had been heard, and argument had."

On the same day that said order was passed, the said Richard Roseberry obtained another Possessory Warrant against the said Robert Roseberry, to recover the possession of the same negroes.

On the 21st of February, 1860, the case made by the second warrant came before the same Justices of the Inferior

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Court for a hearing, when said Justices passed the following order (the said Reynolds again dissenting.) to-wit:

"It is ordered by the Court, that the Warrant, and proceedings thereunder, be dismissed."

On the said 21st day of February, 1860, the said Richard Roseberry obtained a third Possessory Warrant against the said Robert Roseberry, for the recovery of the possession of the same negroes.

On the 29th of February, 1860, the case made by the third Warrant came up for trial, before P. Reynolds, W. S. Lee, W. B. Perry, and B. F. Carr, Justices of the Inferior Court of Newton county.

Counsel for the defendant, Robert Roseberry, moved the Court to dismiss the said third Warrant, on the ground that the rights of the parties had been settled and adjudicated upon a former warrant, in the same Court, and between the same parties, and relative to the same subject matter, and that the plaintiff, Richard Roseberry, was thereby precluded by the said former judgment from further proceedings by Possessory Warrant.

The said Justices overruled the motion, and counsel for the defendant excepted.

The plaintiff, Richard Roseberry, introduced several witnesses, who testified: That the negroes in dispute had been in possession of the plaintiff for a number of years, one of them for ten or twelve and another for eight years, and the others for several years; that the defendant, who is the son of the plaintiff, lived at the same place with his father; that the negroes were kept on the old man, Richard Roseberry's, place, and worked thereon, and waited on the plaintiff, and seemed to be under his control; that, for these reasons, they thought that the negroes were in possession of the plaintiff; that, although the defendant lived at the same place with his father, and some times, and most generally, kept the negroes at work, and superintended and controlled them, the witness thought and supposed, that he was doing so as agent and overseer for his father; that the defendant, a short time after the death of General Williamson, was heard to say that he wanted to be appointed trustee for his father, as the old man would spend and dissipate the property, if he had control of it; that the defendant bought meat, some two years before the trial, and promised to pay for it when the old

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man's cotton was sold, which he did; that, after the plaintiff married, the defendant moved said negroes away from the old man's place to another place, some half a mile distant: the removal occurred some time after the 25th December, 1859.

Counsel for defendant, again, moved to dismiss said Warrant, on the ground that it was not sustained by the evidence, and that the evidence did not make such a case as would in Law authorize a judgment in plaintiff's favor.

The Justices overruled the motion, and counsel for defendant excepted.

The defendant then introduced several witnesses, who testified: That in December, 1858, and at other times, and to different persons, the plaintiff said that he had given up the negroes to defendant, who was to keep them and control them; that, to another, the plaintiff said that he had given the negroes to defendant, that he was to keep, control and use them, and support the plaintiff; that, to another, the plaintiff said that he had given up all his claim to the negroes to defendant, in consideration that the defendant would support the plaintiff during life; that the defendant used, worked, and controlled said negroes, feeding and clothing them, and paying the physician's bills for attending the said negroes; that the defendant supported the old man, and paid the expenses of the farm, living with the plaintiff at the time.

After hearing the evidence and the argument of counsel in said case, the said Justices (Carr dissenting) gave the following Judgment, to-wit:

"Upon hearing evidence, as to the question of possession, it is adjudged and ordered by the Court, that the defendant do deliver the possession of the said negroes, mentioned in said Warrant, to the plaintiff, and that the said plaintiff do execute his bond with good security in the sum of \$6,500, according to the terms of the Statute in such case made and provided, and on his failure so to do, the property to be turned over to the defendant on his giving a like bond."

The defendant, after excepting in writing to all the aforesaid rulings and decisions of the said Justices, applied for and obtained a writ of Certiorari, to bring up all of the proceedings of said case before the Superior Court of said county.

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Upon hearing the said Certiorari, His Honor, E. G. Cabaniss, dismissed the Certiorari and affirmed the Judgment of the said Justices, and the writ of error in this case is brought to review the said judgment dismissing the Certiorari.

CLARK & LAMAR, for the plaintiff in error.

J. J. FLOYD, for the defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

This is an appeal from a Judgment of the Superior Court, on Certiorari, sued out to correct alleged errors of three Justices of the Inferior Court of Newton county, upon the trial of a Possessory Warrant, to try the right of possession, under the Act of December, 1821, entitled: "An Act, more effectually to quiet and protect the possession of personal property, and to prevent taking possession by fraud or violence."

The record discloses the fact, that this was the third warrant sued out, within the present year, by the same plaintiff, against the same defendant, for the same slaves. The first and second warrants were dismissed by order of the Court of original jurisdiction, but upon what ground does not appear. Upon the return of the third warrant, counsel for defendant moved, before any evidence had been submitted, to dismiss the warrant upon the ground, that the matters in controversy had been adjudicated in a previous proceeding, by the same plaintiff, against the same defendant, in the same Court, and that the plaintiff was, by said former judgment, precluded from further proceeding by Possessory Warrant: which motion was overruled and defendant excepted.

After hearing the evidence and the arguments of counsel, the Court ordered the property into the possession of the plaintiff, upon his giving bond and security in terms of the Act above recited. Defendant's counsel excepted. And upon these two exceptions, the Certiorari was predicated. On a hearing of the Certiorari, the Superior Court sustained the Judgment of the Court of original jurisdiction, on both grounds, and defendant excepted to these rulings.

1. The orders dismissing the first and second warrants, would, by their terms, indicate that there had been no judg-

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ment upon the merits—no adjudication of the right of possession, but a dismissal, owing to some informality, or upon the motion of the plaintiff, who may have desired to strengthen his case. They bear a strong resemblance to, and are in the nature of, non-suits, either voluntary or compulsory. It must be conceded that a non-suit, or an order of dismissal in the nature of a non-suit, might, under certain circumstances, be the appropriate disposition of such a cause. Counsel for plaintiff in error argued, with equal earnestness and ingenuity, that, under the provisions of the Act, no other judgment could be rendered in favor of the defendant. We construe the Statute differently. This is its language: "The Judge, or Justice, shall hear evidence, as to the question of possession, in a summary way, and cause the said negroes, or other chattels, to be delivered over to the party from whose possession the same were violently or fraudulently taken, or enticed away, or from whom the same absconded, or *in whose peaceable possession they last were.*" Let it be remembered that, at the time of the hearing, upon the return of the warrant, the property is in the possession of neither party. In the regular course of procedure, under the explicit directions of the Statute, it must have been seized by the officer.

It is, at the hearing, in custody of the Law, and a Judgment of the Court, upon the merits, would seem inconclusive, without, in express terms, awarding the future possession to one or the other. But, recurring to the terms of the Act above quoted, which are directory to the Magistrate trying the case, all doubt vanishes. There are three distinct members of the sentence in this directory clause: the two first of which would seem to indicate the plaintiff as the party into whose possession the property should be ordered, *provided*, of course, that the evidence justified it. But the third member, (which I have italicised,) may refer either to the plaintiff or defendant, as the one or the other may appear from the evidence, to be the party "*in whose peaceable possession they (the chattels) last were.*" It will not be denied that cases may, and often do, occur, in which the evidence shows that the defendant is that party. Indeed, if the plaintiff fail to show, by evidence, that the negroes "were violently, or fraudulently taken, or enticed away, or absconded from him, or were last in his peaceable possession," it results in-

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evitably, as between those parties, that they were lost in the peaceable possession of the defendant. In that event, the Statute is clearly mandatory to the Magistrate, "to cause the negroes, or other chattels, to be delivered to *him*." Failing to do this, he would fail in his duty, and this we will not presume against any Magistrate, unless clearly shown. So construing the Statute, we cannot regard these orders, dismissing former warrants, as adjudications between the parties.

2. The Court below is said to have erred in sustaining the Judgment of the Court, of original jurisdiction, awarding the possession to the plaintiff.

It appears, the relation of father and son existed between these parties: that they lived together at the homestead of the father, where these slaves were; that, at some short time previous, the slaves were certainly the property of the father, and in his possession; that the son superintended his business, and managed his slaves: that the son, upon the marriage of his father, abandoned his home, and took the slaves with him, without his father's consent. In so doing, he must have used either violence, or enticement. Several witnesses, on behalf of the plaintiff, testified to his possession up to that time. Other witnesses testified, on behalf of defendant, to his control of the slaves, whilst on his father's place, and to sundry declarations of the father, to the effect, that "he had given up the negroes to defendant," that "he had given the negroes to defendant," that "he had given up all his claim to said negroes to defendant." None of these expressions, used as they were, whilst the parties lived together, necessarily imply change of possession—or any change beyond such control as an agent or overseer would have, unless they be considered as evidence of a gift, involving the idea of a change of possession. But in *Evans, use, &c. vs. Bowling*, at this Term, we have held, that such declarations are insufficient to prove a gift. The weight of evidence is with the defendant in error.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

*Collins vs. Loyd.*COLLINS *vs.* LOYD.

1. If J. collects money for C., and, when sued by C. on a different demand, claims as a credit an amount paid to G., for C., a part of which payment was the money received by him for C., the Statute of Limitations will not interpose, to protect J. from accountability to C. for the money then collected and paid out for C.
2. Newly discovered evidence, notwithstanding it relates only to the verbal admissions of the party, going to show that he has recovered wrongfully, is a good ground for granting a new trial.

Assumpsit in Fulton Superior Court. Tried before Judge BULL, at the April Term, 1860.

James A. Collins brought an action of Assumpsit in Fulton Superior Court against James Loyd, to recover the sum due on a promissory note given by the defendant, payable to the plaintiff, dated the 27th of July, 1851, and due the 25th of December, 1852, for eight hundred dollars, with interest from the date of the note. There was a credit endorsed on the note of "forty dollars and twenty-five cents, amount of J. Gilbert's note," and dated June 1st, 1857.

The defendant pleaded a set-off against the plaintiff's demand, which set-off consisted of a payment, by the defendant, for the use and benefit of the plaintiff, and at his request, of three hundred and fifty dollars, to one Joshua Gilbert.

On the trial of the case the plaintiff introduced, in evidence, the note sued on, and closed.

The defendant then proved by Joshua Gilbert, that on the 13th of February, 1855, the defendant paid him, for the plaintiff, a Physician's bill of two hundred and eighty-one dollars, or about that sum; that this amount included seventy-two dollars due him, by Miss Sarah Venable, and four dollars due him by Miss Jane Venable, and twenty-four dollars due him by Miss Julia Bolton, but which was all charged to the plaintiff; that plaintiff told the witness to settle with defendant, and it would all be right; the plaintiff and defendant were brothers-in-law, and had been in partnership a number of years before the transaction between defendant and witness. In answer to one of the cross interrogatories, to-wit: "Did defendant pay you any

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money? If so how much? Was not the principal amount paid you, paid in an account you owed Collins & Loyd?" the witness stated: "Defendant paid me some money, the amount he does not recollect. I owed Collins & Loyd an account; the amount I do not recollect. It was a small account."

The defendant then closed; and the plaintiff, in rebuttal, offered to prove by William R. Venable, "That the firm of Collins & Loyd was dissolved previous to the 21st of October, 1847, and that shortly after this suit was commenced the defendant told witness that the note sued on was given for the purchase money of a city lot in Atlanta." Counsel for defendant objected to the evidence, and the objection was sustained, and the evidence repelled by the Court, the plaintiff excepting.

The plaintiff then offered in evidence the original receipt, of which the following is a copy, (the execution of the same having been proven,) to-wit:

"ATLANTA, GA., Oct. 21st, 1847.

"Received of Collins & Loyd, the account against Joshua Gilbert for three hundred and nine dollars, thirteen cents, which I, James Loyd, am to pay Jas. A. Collins one-half of the proceeds, when collected; and also one account on A. H. Green, dec'd, for one hundred and twenty-nine dollars and seventy-three cents.
JAMES LOYD."

To the introduction of this receipt Counsel for the defendant objected, and the Court excluded the evidence, and plaintiff excepted.

The plaintiff then introduced as a witness the Hon. Wm. Ezzard, who testified, "That in 1848, he, as Administrator of A. H. Green, deceased, paid to the defendant the sum of one hundred and thirty dollars and twenty-six cents, on an account in favor of Collins & Loyd against the said deceased." Counsel for defendant moved to withdraw said testimony from the consideration of the Jury, and the Court sustained the motion, and plaintiff excepted.

The presiding Judge, amongst other things, charged the Jury—

"That if the accounts of Sarah Venable, Jane Venable and Julia Bolton were charged to the plaintiff by Gilbert, and that the same were paid to Gilbert by defendant on a settlement between the defendant and Gilbert, the Jury were

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authorized to infer, that the plaintiff was bound for the amount of the accounts, at the time they were paid, without other evidence of the fact;" to which charge plaintiff excepted.

The Jury returned a verdict in favor of the plaintiff for the sum of seven hundred and ninety-two dollars and fifty-four cents. with interest from June 1st. 1857. with cost of suit.

Counsel for the plaintiff then moved for a new trial in said case, on the following grounds, to-wit:

1. Because the Court erred in repelling the evidence of William R. Venable, offered by the plaintiff. as herein before stated.
2. Because the Court erred in not admitting in evidence the receipt given by defendant, as aforesaid.
3. Because the Court erred in withdrawing the testimony of William Ezzard from the consideration of the Jury.
4. Because the Court erred in charging the Jury as herein before given.
5. Because the verdict of the Jury was strongly and decidedly against the weight of evidence in said case.

To this motion for a new trial, was added, by amendment. another ground, to-wit:

6. Because, since the trial, and since the adjournment of the Court at which the Rule Nisi was applied for, the defendant has discovered that he can prove by Cicero H. Chandler, "that the defendant, James Loyd, told said Chandler that he, Loyd, only claimed a deduction of between one hundred and thirty and one hundred and forty dollars from the note sued on in said case:" which testimony did not come to the knowledge of plaintiff until after the trial, and after the application for a new trial.

This last ground was supported by the affidavits of the plaintiff and the said Cicero H. Chandler.

The presiding Judge overruled the motion for a new trial: and this decision is alleged to be erroneous, and a reversal of the same is asked by the plaintiff in error.

BLECKLEY & HOYT, for the plaintiff in error.

EZZARD & COLLIER, for the defendant in error.

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By the Court.—LUMPKIN, J., delivering the opinion.

Collins sued Loyd on a promissory note for \$800, given in July, 1851, and due 25th of December, 1852, with interest from date—the consideration for which was a lot sold in the city of Atlanta, by Collins to Loyd.

To this action the defendant pleaded a set-off of \$281, paid by him, for the plaintiff, to one Joshua Gilbert, on a medical account, due by Loving G. Collins to Dr. Gilbert.

As a reply to this plea of set-off the plaintiff proposed to prove the following facts, to-wit: That previous to the year 1847 he and Loyd had been partners in trade: that a dissolution took place before the 21st of October of that year; that on the day last aforesaid Loyd receipted to the firm of Collins & Loyd for an account due the firm by Dr. Gilbert of \$309 13, promising in the body of the receipt to pay over an account to Collins for one-half of said firm debt, when collected. And in connection with this receipt Collins relied on the evidence of Dr. Gilbert to establish that this account due by him to the firm was included in the settlement between Loyd and himself, made in February, 1855, the time when Loyd claims to have paid the \$281 for Collins—Collins insisting that in the \$281 was included the one-half of Dr. Gilbert's firm debt coming to him, namely, \$154 56½. In other words, that that amount of the \$281 was paid with his own money: and that, consequently, instead of Loyd's being entitled to a credit of \$281, he could only claim the difference between \$281 and \$154 56½.

Dr. Gilbert was examined by commission, by Loyd, and very closely cross-questioned by the plaintiff, as to the manner in which the \$281 was paid—whether in money and how much—and whether an account due by him to Collins & Loyd was not taken into the settlement?

His answer is unsatisfactory. He answers: "The defendant, (viz: Loyd,) paid him *some money*, the amount he cannot recollect. It was a small account. The money was paid the day the receipt bears date, (namely, his receipt for \$281, paid by Loyd to him, for Collins.) That was the day of settlement."

His Honor, the presiding Judge, on the idea that the receipt given by Loyd to Collins, in 1847, was barred by the Statute of Limitations, and that if the money had been

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collected by Loyd the presumption was, it had been accounted for, or from some other consideration, ruled out Loyd's receipt for the Gilbert debt to the firm.

We cannot concur in this view of the transaction. There is not a particle of proof that this account was settled prior to February, 1855. The fact that there were counter-claims outstanding between these parties may explain the cause of this delay. It is clear, from Gilbert's testimony, that the whole amount of the \$281 paid by Loyd to him, for Collins, was not in money. Gilbert says, "*some money* was paid;" from which it may be fairly inferred that a portion, at least, if not the bulk of the payment, was in something else. The witness swears there was a small account due by him to Collins & Loyd; and it is deducible from his language, that that account, be it more or less, was included in the settlement.

Now, if there was any other account due by Gilbert to Collins & Loyd, except the one receipted for by Loyd in 1847, why was it not shown? It was an affirmative fact and susceptible of easy proof. But again: the firm of Collins & Loyd having dissolved prior to October 1847, it almost amounts to a demonstration that there was but the one account, and, therefore, the one taken into the settlement.

And if the \$281 was paid in part by Collins' money, the Statute of Limitations is not in his way, nor will it, till the end of time; but will come up for his protection whenever Loyd seeks to hold him responsible for the \$281.

A new trial was asked by Collins on the ground that, since the trial, he had discovered that he could prove by one Cicero Chandler that Loyd had stated to him that, instead of \$281, there was only some one hundred and thirty or one hundred and forty dollars due him by Collins; and Chandler gives his affidavit that he will testify to this admission, should there be a re-hearing.

The Judge repudiates this ground for a new trial, not because the proof is cumulative merely, as that it is not pertinent to the issue, or that there has been any want of diligence in not finding it out, but to discourage the practice of making this sort of testimony the ground for a new trial.

Now, while we may concur with our Brother upon his view of what the Law ought to be, we do not feel at liberty to deprive a party of a clearly recognized right, allowed to

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him by law, on the score of policy. Our Statute only forbids the granting a new trial upon newly discovered evidence which is cumulative merely, and not because the witness proposes to testify as to the verbal statements and admissions of the party; and the more especially should the new trial be awarded, because the declarations made by Loyd corresponds so nearly with the other facts developed in this case, and all going to show that the defendant has obtained a credit for too large a sum by the difference, at least, between \$281 and \$154 56½—the one-half of the account due by Gilbert to the firm of Collins & Loyd—to say nothing of the mistake in calculating interest on the note sued on.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the judgment of the Court below be reversed, upon the ground that the Court erred in not granting a new trial.

MACON & WESTERN RAILROAD COMPANY
vs. **McCONNELL.**

1. A wood pile of the Macon & Western Railroad Company took fire, from the engine passing or standing near it, at the Jonesboro' Station, and the fire communicated from the wood pile to the plaintiff's house and destroyed it.
Held,

1. That the Road had the right to have the wood pile at that Station, in such quantities and to such extent as its agents or employees thought proper, &c.
2. That it is error in the Court, after laying down the rule of defendant's liability correctly, to add a qualification that has the effect of negating such rule.
3. To make the Road liable for the burning of the house, it must be shown affirmatively, that a fire originated from some act of gross neglect, or carelessness on the part of its agents or employees.

Macon & Western Railroad Company vs. McConnell.

Action for Damages, in Clayton Superior Court. Tried before Judge BULL.

This was an action, brought by William N. McConnell, against the Macon & Western Railroad Company, to recover damages for certain buildings and other property of the plaintiff, which, he alleged, was destroyed by fire, through carelessness and negligence of the said Company, and its agents and employees.

The evidence in this case disclosed the following state of facts, to-wit:

The Macon & Western Railroad Company had a wood and water station in the town of Jonesboro', and had hauled up a large quantity of dry pine-wood, some of which was rich lightwood, and the same was thrown out, and lay along and very near the track, for a distance of from one hundred and twenty-five yards to one hundred and fifty yards; the wood was not put up in cords, or a compact pile, but was a confused heap, six or eight feet high, twenty or twenty-five feet wide, and between a hundred and twenty-five and a hundred and fifty yards long, and within twenty or twenty-five feet of the house of the plaintiff, McConnell; the wood was all on the space covered by the Company's right of way, which was fifty feet from the track, each way; there was a great deal of wood used by the Company at the station in Jonesboro', from which six or eight trains were supplied every day: that, on the 24th day of March, 1855, there was about three hundred cords of wood at the station, but not more than was necessary for the use of the Company's Road at that place, and that the wood would not have lasted more than three months: that it was customary for the Company to haul up to the station in the winter, or the first of the spring, wood enough to last through the summer, but it was not usual to cord up the wood; that there had been, at different times, a much larger quantity of wood at said station, which had been established ever since the Company's Road was completed to Jonesboro', and for several years before the house of the plaintiff was built; that, on the said 24th day of March, which was a very dry, windy day, and whilst the engine and freight train of the Company had stopped on the track, the said wood pile caught fire, and communicated the same to the dwelling house of the plaintiff, McConnell, and which

continued to spread, until his dwelling house, and some of his furniture, his kitchen, his smoke-house, his well-house, his corn crib and corn, his shop, and fencing, and wagon, were all consumed; that the wood pile was very near to, and on the East-side of, the track, and between the track and plaintiff's house; that the wind was blowing from the West, and the blaze from the fire extended from the wood pile to the house of plaintiff, and some times above and beyond it, at times covering it up, as it was raised by the wind; that the fire was first discovered near where the engine and train were standing on the track; that the engineer was eating dinner when the alarm of fire was given, and jumped up and ran to his engine, which was left in charge of the fireman whilst he was at dinner; that the fireman usually shifted the cars, and was very competent for that service, and was engaged in that service at the time: that, if the wood had been piled up carefully, or put in cords, it would not have covered more than about half the space it did, and would not have extended along the track as far as plaintiff's house, and would not likely have communicated fire to it: that the engine, which was at the station at the time of the fire, was in good order; that it had a spark-catcher, which, together with the ash-pan, were in good order; that the shutter of an ash-pan can be raised, so as to let out the ashes when the wind is blowing, and that of the engine, which was at the station, was generally kept open a little, to admit a draught; that, if the fire was caused by any carelessness or negligence of the persons having the care and management of the train, the conductor nor engineer (both of whom were sworn and testified in the case,) did not see it, or know it, but that, on the contrary, the employees of the Company used the ordinary care and diligence in the management of said train; that, in the judgment of one of the witnesses, the fire could have been extinguished by the train hands, at the time it was first discovered, but such witness did not state how many train hands there were, nor where they were at the time the fire was first discovered; that the plaintiff's property, which was consumed by the fire, was worth, in the aggregate, about fifteen hundred dollars.

The testimony being closed, the Court charged the Jury;

"That the Macon & Western Railroad Company is a chartered Company, having the right to use all the rights con-

ferred on it by its charter, as fully, and to the same extent, as an individual has, to enjoy his legal rights: that amongst these, is the right to use their cars and engines, to have their wood and water stations at convenient places, and all the appliances necessary to the complete enjoyment of all their chartered privileges; that they have a right to provide and keep, at their several stations, such supplies of wood as may be necessary, not only for present but for future use, as circumstances may require, and they are the judges of what amount is necessary. And they are not responsible for accidents, happening from the exercise of their rights, unless those accidents result from the gross negligence or carelessness of the employees or agents of the Road. The plaintiff must prove that the injury complained of did result from such culpable negligence or carelessness.

"The amount of diligence required is just so much as an ordinarily prudent man would use in his own affairs. If a man choose to build, or buy a house, in close proximity to a Railroad station, where wood is ordinarily kept for the use of engines, he does so at his own risk. He voluntarily undertakes to incur the ordinary risks incident to such a location, and if his house is burned, without the culpable negligence of the agents or employees of the Company, he has no redress against them. He is presumed to take the risk himself. But this presumption does not arise, if the location of the wood pile is changed after he builds or buys. Plaintiff's counsel contend that the Company was guilty of culpable negligence, in accumulating an unnecessarily dangerous quantity of wood in immediate proximity to the plaintiff's premises, in such manner and quantities as the interests of the Road did not require. On this point, as before remarked, the Company have the right to have their wood stations at such points as are necessary, and they are not required to keep just so much (and no more) as is necessary for present wants, but they have the right to keep such supply as will secure them against the danger of having their stock exhausted at a time when it would be inconvenient to supply it, and they must necessarily be the judges of this matter; and to make the Company liable, the plaintiff must prove affirmatively that the quantity was unnecessarily large, or unnecessarily extended within dangerous proximity to the plaintiff's premises, and that the injury resulted from that fact. What

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would be gross negligence under one set of circumstances, might be no negligence under another; by way of illustration: A man burning out his chimney with a bundle of fodder, on a dry, windy day, and thus setting fire to his own or his neighbor's house, would be guilty of gross negligence, whilst it would be no negligence at all if done on a rainy day. I intimate no opinion, as to the facts of this case, as I always carefully avoid assuming any fact whatever to have been proven, in giving my charges to the Jury, nor did I do so on the former trial, and, though reversed on that ground, I am confident that neither the Jury or the counsel so understood me, though the Supreme Court did. The charge then carried up, was not in the exact language of this charge, though correct in substance."

The Jury returned a verdict for the plaintiff for fifteen hundred and twenty-five dollars, with cost of suit.

Counsel for defendant moved for a new trial, on the following grounds, to-wit:

1. Because said verdict was contrary to Law and evidence.
2. Because said verdict was decidedly against the weight of evidence, and without sufficient evidence to support it, and, therefore, illegal and wrong.
3. Because the Court erred in charging the Jury as before set forth.

The presiding Judge refused the new trial, and the object of the writ of error in this case is to reverse that decision.

TIDWELL & WOOTEN, for the plaintiff in error.

J. M. & W. L. CALHOUN & J. F. JOHNSON, for the defendant in error.

By the Court.—**LYON, J.**, delivering the opinion.

The Court charged the Jury: "That the Macon & Western Railroad Company is a chartered Company, having the right to use all the rights and privileges, conferred on it by its charter, as fully, and to the same extent, as an individual has to enjoy his legal rights. That, amongst these, is the right to use their cars and engines, to have their wood and water stations at convenient places, and all the appliances necessary to a complete enjoyment of all their chartered

privileges. That they have the right to provide and keep, at their several stations, such supplies of wood as may be necessary, not only for present, but for future use, as circumstances may require—and they are the judges of what amount is necessary; and they are not responsible for accidents happening from the exercise of these rights, unless these accidents result from the gross negligence or carelessness of the employees or agents of the Road, and the plaintiff must prove that the injury complained of did result from such culpable neglect or carelessness. The amount of diligence required is just so much as an ordinarily prudent man could use in his own affairs. If a man chooses to build, or buy, a house in close proximity to a Road station, where wood is ordinarily kept for the use of the engines, he does so at his own risk. He voluntarily undertakes to incur the ordinary risks incident to such a location, and if his house is burned, without the culpable negligence of the agents or employees of the Company, he has no redress against them."

1. We think, the charge so made, fairly presented the Law of this case. But when the Court, in a subsequent portion of this charge, added: "And to make the Company liable, the plaintiff must prove, affirmatively, that the quantity (of wood) was unnecessarily large, or unnecessarily extended within dangerous proximity to the plaintiff's premises, and the injury resulted," &c.

2. We think, he committed error; for it was repugnant to the charge he had already given to the Jury. If the Road had the right to collect and have wood at the station in such quantities as they think proper or necessary, and of which they were to judge, the Jury had no right to consider the quantity of wood, or its extent, in considering whether the Road was liable for the injury, nor its proximity to the plaintiff, so long as it was their right to put their wood at that place. The effect of this qualification, we think, negatived the principle the Court had previously given to the Jury, and which, we think, to be the Law of the case.

• 3. But, we think, the plaintiff in error is entitled to a new trial on another ground, and that is: the verdict is strongly and decidedly against the weight of the evidence and Law. Instead of showing that the Road, or its employees, were guilty of any gross or culpable neglect, which was necessary to charge the Road with the plaintiff's dam-

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ages or injury, the evidence disclosed not the slightest neglect of any character. The day was a very dry and windy one, but the plaintiffs were obliged to use fire in the running of the engines, and in running them along the Road, even upon their own property, and in the pursuits of their ordinary and daily vocations.

There is not one fact, to which may be pointed as neglect, or the want of due care and attention. The fact that the ash-pan was kept a little open, is pointed to as a circumstance. The testimony is: that this was usual and necessary, and that the pan was in good order. Another circumstance is: that the fireman was allowed to manage the engine, in shifting the cars, that took place that day at the station. The testimony is: that this was usual, and that he was competent for that purpose. Another, and the only other fact, that I can think of, was referred to, and that was, that the employees did not, at once, drop every thing else and try to suppress the fire, or prevent the injury. Their first duty was to save the property in their cars, and which was exposed to the fire. After this was done, I believe, it was not denied but that they rendered all the assistance they could.

To make the Railroad Company liable for this injury, it must be shown, affirmatively, that the fire occurred from some positive act of neglect or carelessness on the part of the employees of the Road. This was not done, and until it is, the plaintiff in error cannot be held liable for the misfortunes of the defendant in error. So a new trial must be granted.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed. The Court, after laying down the rule correctly, that the plaintiff in error had the right to keep, at their several stations, such supplies of wood as may be necessary for present or future use, and that they are the judges of what is necessary, and that they were not liable for any accident that may happen from the exercise of any of their rights, unless it resulted from the gross negligence or carelessness of its employees, erred in qualifying such rule, by charging the Jury that the

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plaintiffs must prove, affirmatively, that the quantity of work on hand was unnecessarily large, or unnecessarily extended. The Court should have granted a new trial on this ground, and on the additional grounds that the verdict was contrary to, and without evidence, and against Law.

LOYD, PERRYMAN & MILLS vs. HICKS.

1. The Court of Equity of the State of Tennessee have jurisdiction of persons residing in the State of Georgia, who are parties to proceedings in that Court, and who appear and answer, and are heard in the same.
2. A decree in Equity is the judgment or sentence of a proceeding instituted in that Court, and no other is necessary.
3. A decree rendered against a partnership is good, although in the decree the name of the partners are transposed in the firm-name.
4. When the verdict is for an amount greater than the evidence warrants, the excess must be remitted, or a new trial will be granted.

Debt on a Judgment, in Fulton Superior Court. Tried before Judge BULL, at the April Term, 1860.

This case was heard, upon the following state of facts, exhibited by the record, to-wit:

An action of Debt was instituted in Fulton Superior Court, by George W. Hicks, against Loyd, Perryman & Mills, to recover the amount of a decree, rendered by the Chancery Court of Hamilton county, Tennessee, in favor of the said Hicks, against the said Loyd, Perryman & Mills. James Loyd, one of the defendants, filed the plea of *no trial record* to said action of debt.

On the trial of the case, the plaintiff offered in evidence an exemplification of the record of the proceedings in Chancery, and the decree sued on; to the introduction of which counsel for the defendant objected on the following ground to-wit:

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1. Because two of said defendants, to-wit: James Loyd and George M. T. Perryman, were non-residents of the State of Tennessee at the time the bill was filed in which the decree was rendered.

2. Because there was no Judgment in said case.

3. Because the decree was not against Loyd, Perryman & Mills.

The Court overruled the objection, and admitted the exemplification, because it appeared from said exemplification that Enoch R. Mills, one of the defendants, was served with process, and answered the bill; and that James Loyd, another one of the defendants, also answered said bill, which, by agreement, was used and considered as the joint answer of the said Loyd, and of George M. T. Perryman, the other defendant; and because it also appeared from the exemplification, that the decree was rendered against the same defendants, although the firm, name and style used in the decree was "Mills, Loyd & Perryman," instead of "Loyd, Perryman & Mills."

To this ruling of the Court, the defendants excepted.

The Court, amongst other things, charged the Jury: That a decree in Chancery was itself a judgment, and that no further judgment was necessary to be entered on the decree in order to maintain an action against the defendant in such decree; and defendants excepted.

The Jury returned a verdict in favor of the plaintiff, for two hundred and seventy-two dollars and ninety-three cents, with interest and cost.

Counsel for defendant then moved for a new trial, on the grounds following, to-wit:

1. Because the Court erred in admitting the said exemplification in evidence.

2. Because the decree in said case, if any existed, was in favor of George W. Hicks, as receiver of the effects of Gains & Co., and not in favor of George W. Hicks, in his own right; and because the decree was against Mills, Loyd & Perryman, and not against Loyd, Perryman & Mills.

3. Because said exemplification did not show that any judgment had been entered up in said case.

4. Because the Court erred in charging the Jury, that a decree in Chancery was itself a judgment, and that no further judgment was necessary to be entered on the decree in

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order to maintain an action against the defendants in such decree.

5. Because the verdict of the jury was contrary to Law, and contrary to evidence, and without evidence, as the decree was rendered for only two hundred and fifty-two dollars and sixty-three cents, and there being no evidence that the plaintiff ever paid any costs, "in the first instance," as said decree required.

The Court overruled the motion for a new trial, and error is assigned upon this decision, and a reversal of the same asked for.

GARTRELL & HILL, for the plaintiff in error.

GLENN & COOPER, for the defendants in error.

By the Court.—LYON, J., delivering the opinion.

The demurrer to the exemplification was properly overruled.

1. The fact that two of the defendants in that proceeding were non-residents of the State of Tennessee, did not deprive the Courts of that State of jurisdiction, they having appeared and answered and been heard in the cause. That fact, in the absence of anything else, gave that Court jurisdiction to bind them personally, by its judgment.

2. The decree rendered in an Equity cause is the judgment or sentence of that Court, and no other is necessary, or can be had.

3. The decree was against the defendants in this cause: that the order of the firm-name was transposed did not the less render the decree effectual against the defendants, either as individuals or partners.

The amount of the decree, on which suit was brought, was \$252 63; the verdict of the jury was for \$292 93—being \$20 30 in excess of the decree. This excess was, no doubt, intended by the jury to cover the amount of the costs of the proceeding in the State of Tennessee; but as the record brought here does not show that to be the fact, the verdict, in so much, was contrary to evidence, and the plaintiff must remit the same from the finding, or a new trial must be granted on that ground. If the \$20 30 be remitted, judgment must be affirmed.

Allen vs. Hollis.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed, upon the condition that the plaintiff therein remit, on or before the first day of the next Term of the Superior Court of Fulton county, the sum of twenty dollars and thirty cents, from the principal sum, as there was no evidence before the jury to support that amount of the finding; and in case the plaintiff fails to remit, that a new trial be had in the Court below, on that ground.

ALLEN vs. HOLLIS.

1. When goods are sold, and nothing is said as to the time of delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer—the seller being bound to deliver them whenever they are demanded, upon the payment of the price—the buyer having no right to the possession of the goods till he pays the price.
2. The assent of the vendee to take the specific chattel, and to pay the stipulated price, is equivalent to his accepting possession: and the effect of the contract is, to vest the chattel in the bargain, &c.

Assumpsit, in Spalding Superior Court. Tried before Judge CABANISS, at the May Term, 1860.

James M. Hollis commenced an action of Assumpsit, in the Superior Court of Spalding county, against Josiah Y. Allen, to recover the purchase price of three negroes, to-wit, Rose and her two children, Bob and Hannah, which, he alleged, had been, before that time, sold to the said Allen by him.

The facts of the case were as follows:

The defendant, Allen, wrote a letter to the plaintiff, dated:

Allen vs. Hollis.

"GRIFFIN, GA., Sept. 26th, 1858.

.. MR. J. M. HOLLIS.

"*Dear Sir:*—Yours of the 19th was handed me by Lew, yesterday, saying, that you had concluded to take my offer for Rose and children, that being fifteen hundred dollars, which I shall consider a trade. You can keep them until I return from the West, say some time in December, at which time I expect to pay you for them.

"I remain yours, most respectfully,

"J. Y. ALLEN."

On the 29th of December, 1858, the negro woman, Rose, died, without fault or negligence on the part of plaintiff, by whom, up to that time, she and her children were kept and well cared for; that, on the 28th of January, 1859, the plaintiff tendered to defendant the two children of Rose, with a bill of sale, conveying the same to him, and demanded payment of the fifteen hundred dollars, which defendant refused to pay; that defendant admitted that he valued Bob at five hundred dollars, Hannah, at three hundred, and their mother, Rose, at seven hundred dollars, she being a number one field hand.

The presiding Judge charged the Jury as follows:

"There must be a contract or agreement, to which both parties assent. An agreement, or bargain, can be made by correspondence, as well as by the parties being present face to face; and when a proposition is made by one party, and accepted by the other by letter, the bargain is complete upon the letter accepting the proposition, being deposited in the Post Office, or otherwise sent. And when the bargain is complete, and the trade is made, the property in the thing sold vests in the buyer, if there be nothing more necessary to be done to designate the thing sold. Where, by the contract, the seller appropriates to the buyer a specific chattel, or thing, and the latter agrees to take that specific chattel, or thing, and to pay the stipulated price, the property in the thing sold passes, without delivery, if the agreement to purchase be reduced to writing, and signed by the party to be charged therewith. And when the property in the thing sold vests in the buyer, and there is a loss or destruction of the property before the change of possession, the loss falls on the buyer. Applying this Law to the facts of the case before you: If the defendant proposed to give the plaintiff a

certain price for the negroes, and the plaintiff accepted that proposition, and the defendant, then, ratified the acceptance of the plaintiff in writing, that amounts to a bargain, and passed the property in the negroes to the defendant, and any loss by the death of either of the negroes, afterwards, must fall on the defendant. If these facts appear from the proof (and any admissions made by the defendant, under his own hand-writing, is proof)—if these be the facts, you will find for the plaintiff the price agreed to be paid for the negroes, with interest from the time it became due. If there was no sale of the negroes by plaintiff to the defendant, you will find for the defendant.

"That, under the Statute of Georgia, contracts for the purchase of slaves must be in writing, and must be signed by the party to be bound by the same, and that, in order to the legal validity of such contracts, they must be mutually binding on each party, so that neither party can take advantage of, or avoid the contract, by virtue of the Statute."

The Jury returned a verdict in favor of the defendant, with cost of suit.

Counsel for the plaintiff, then, moved for a new trial, on the following grounds, to-wit:

1. Because the verdict of the Jury was contrary to the evidence, and decidedly against the weight of the evidence.
2. Because the verdict of the Jury is contrary to Law.
3. Because the verdict of the Jury was contrary to the charge of the Court.

The presiding Judge sustained the motion, and passed an order setting aside the verdict and award, in a new trial.

This decision of the presiding Judge constitutes the error assigned in this case.

ALFORD, for the plaintiff in error.

GIBSON & MOORE, represented by BECK, PEEPLES & CABANISS, T. B. CABANISS, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Some negotiations had taken place between these parties, respecting the sale of a family of negroes, to-wit: a woman

 Allen vs. Hollis.

and two children, owned by Hollis, and which Allen proposed purchasing. We learn from the letter, written by Allen to Hollis, that Allen had offered fifteen hundred dollars for the slaves. Hollis agrees to accept Allen's offer. And this is shown by the letter, written by Allen to Hollis, dated 26th September, 1858, in which he says: "Yours of the 19th was handed me by Lew yesterday, saying, you had concluded to take my offer for Rose and children—that being fifteen hundred dollars—which I shall consider as a trade. You can keep them until I return from the West, say some time in December, at which time I expect to pay you for them."

This letter is a ratification, by Allen, of the acceptance by Hollis of his, Allen's, offer. It is argued, that stipulations are added, by Allen, which it does not appear Hollis ever acceded to, namely: that Hollis should keep the negroes till he, Allen, returned from the West, when he expected to pay for them. It may be that this was a part of the agreement between the parties, and that it was inserted in his letter, in order that the writing might contain the whole contract. But, suppose they were new or superadded terms, Hollis, on receiving Allen's letter, should have repudiated them. Allen writes, that he considers it a trade, and the silence of Hollis amounts to an acquiescence in all the terms stated in Allen's letter.

Mr. Broom, in his *Commentaries upon the Common Law*—a book containing more Law than any volume of its size extant—says: "Property in specific chattels may pass without delivery. It will so pass, when, at the time of the bargain, every thing is already done, which, according to the intention of the parties, was necessary to transfer the property. The appropriation of the property being equivalent to a delivery by the vendor, and the assent of the vendee to take the specific chattel and pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is: to vest the chattel in the bargainee."

The author adds: "Where goods are sold, and nothing is said, as to the time of delivery, or the time of payment, and every thing the seller has to do with them is complete, it is here, as a general proposition, that the property vests in the buyer—the seller being bound to deliver them whenever they are demanded, upon the payment of the price—the buyer having no right to the possession of the goods till he pays

for them." *Pages* 409—410. And numerous authorities are cited in support of this position.

Suppose, then, the contract in this case had been silent, both as to the time of delivery and the time of payment, still nothing remaining to be done by Hollis, the property would have vested in Allen, still he must pay or tender the price, before he would have been entitled to the possession. But a loss, accruing under these circumstances, would fall upon Allen, and not upon Hollis.

But that is not this case. Here, the time of delivery and of payment are specified by the buyer, and not objected to by the seller. And this was such an appropriation of the property as was, to all legal purposes, equivalent to a delivery.

We concur, therefore, with the Circuit Court, that the verdict of the Jury was contrary to the testimony, the Law, and the charge of the Court.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

WISE *et al.* vs. MOORE.

A deed made, pending a suit to a Trustee for the benefit of the wife and children, to defent the collection of such recovery as might be had in that suit, is fraudulent and void as to the judgment. recovered on that suit, whether the grantees had notice of the fraudulent intent or not.

Levy and Claim, in Butts Superior Court. Tried before Judge CABANISS, at the March Term, 1860.

This case came up for review, and was heard upon the following state of facts, as exhibited by the record, to-wit:

On the 19th day of December, 1854, David A. Moore commenced an action on the case for words, in Butts Superior Court, against Henry Jester. On the 5th day of July, 1855, and whilst said action was still pending and undetermined, Henry Jester executed a deed of gift, conveying all his property, real and personal, to his brother, Benjamin Jester, in trust, for the wife and children of the said Henry Jester, and for their separate use for life; and stipulating in the deed, that the Trustee should have the right to sell any of the property conveyed, by the written consent of the wife, and that he should also be "authorized to sell any part of said property, to pay all the just contracts of the said Henry Jester with all persons; and to employ any part of said property in defraying any expense in sustaining the title conveyed by the deed." Benjamin Jester accepted the trust, and the deed was duly recorded on the 6th day of July, 1855. On the 9th of December, 1856, a final judgment was rendered in said action on the case, in favor of said David A. Moore, against the said Henry Jester, for one thousand dollars damages and costs of suit. An execution issued from said judgment, and on the 24th of December, 1856, was levied on two of the negroes conveyed in the deed aforesaid, which were on the place on which Henry Jester and his wife and children lived, and which negroes were pointed out to the Sheriff by Henry Jester, who at first refused to point them out. On the 2d day of February, 1857, Benjamin Jester, as Trustee as aforesaid, interposed a claim to the negroes, pending which claim Benjamin Jester died, and Witt C. Wise was duly appointed Trustee, and made party claimant in his

steal. There was no evidence that the wife and children of Henry Jester knew or had any notice of any fraudulent intention actuating Henry Jester in the execution of said deed of gift.

On the trial of the claim case, the Court, amongst other things, charged the jury: "That if the deed of trust, made by Henry Jester to Benjamin Jester, was voluntary and without valuable consideration, and was made pending the suit of the plaintiff in execution, against Henry Jester, and to defeat any judgment or recovery of the plaintiff against Henry Jester, it was fraudulent and void, and notice of the fraud in a voluntary conveyance was not necessary in order to avoid it.

The jury found the property subject to the execution; and counsel for the claimant made a motion for a new trial on the grounds:

1. Because the Court erred in giving the charge aforesaid.
2. Because the verdict of the jury is against the evidence of the case, and against the weight of the evidence, and against the law of the case.

The Court overruled the motion and refused a new trial: and this decision is the error complained of in this case.

O. C. GIBSON & D. J. BAILEY, by BECK, for the plaintiff in error.

DOYAL, PEEPLES & CABANISS, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The charge given by the Court is in conformity to the rulings of this Court, and all others, upon this subject, that I know of. *Peck vs. Land*. 2 *Kelly*, 12. *Fleming vs. Townsend*. 6 *Geo.*, 107. *Galt vs. Jackson*. 9 *Geo.*, 157. *Clayton vs. Brown*. 17 *Geo.*, 217. *Clayton vs. Tucker*. 20 *Geo.*, 452. Voluntary deeds, to be protected from the operation of the 13 Elizabeth, must be *bona fide* made, and upon good consideration; if made with intent to defraud creditors they cannot be either one or the other. *Rob. on Fraud—An*. 448. A deed made like this for the benefit of the wife

and children, and with intent to defraud creditors is void with or without notice.

We think the evidence sufficient to warrant the charge and support the finding.

JUDGMENT.

Whereupon, it is considered and adjudged, by the Court, that the Judgment of the Court below be affirmed.

WARD *et al.* vs. LAMBERTH.

1. Courts of Equity more readily raise and act upon a presumption of fraud from facts proven, than do Courts of Law.
2. A. purchased a tract of land, at Sheriff's sale, at a price much below its value, under an agreement with B., (the defendant in execution,) that he would hold the land for the benefit of B., or of B. and his family, and that the latter should, as he might be able, refund the purchase money with interest. A., after, executed a bond for titles to said land, to C., a minor son of B.—C. having knowledge of the original agreement. B. repaid part of the purchase money, and remained in possession of the land until his death, ten years after the Sheriff's sale. D., a creditor of B., whose debt existed before the purchase by A., filed his bill to set aside A.'s deed, and C.'s bond for titles, and for a re-sale of the property for his benefit. Decreed accordingly, with a proviso that the balance of purchase money due A., with interest, be first paid from the proceeds of the re-sale. *Held*, that the decree was right.

In Equity, in Clayton Superior Court. Tried before Judge BULL, at the May Term, 1860.

Joseph Lamberth filed his Bill in Equity, in the Superior Court of Fayette county, against Jesse Ward and John S. Westbrook, in which he complains:

That he was the security upon the guardian's bond of

Gainey Westbrook, guardian of the minor children of one Isaiah Warren, deceased; that the said Gainey Westbrook, having failed to account to his said wards, in respect to such guardianship, was sued by them, and a judgment had against him for a considerable sum of money; that a *fi fa* issued from said judgment and was returned by the proper officer; that there was no property of the said Gainey Westbrook to satisfy the same; that a Bill in Equity was then filed against the said Gainey Westbrook, as principal, and the complainant, as security, on said guardian's bond, and, at the September Term of the said Superior Court, in the year 1853, a decree was rendered in favor of the Ordinary, for the use of the said minors, against the said Gainey Westbrook, as principal, and the complainant, as his security, for the sum of twelve hundred and fifty-four dollars, with interest from the first day of March, 1852, and all cost; that an execution issued from said decree, and was levied on lot of land number 141, in the seventh district of said county, as the property of the said Gainey Westbrook, of which land the said Gainey Westbrook was then in possession, and had been for more than eighteen years, having bought and paid for the same with the funds of his said wards; that the said Gainey continued to reside upon, and possess, said land, until some time in the year 1856, when he died, leaving his family in possession of said land, and who were in possession up to the time of filing said bill; that, in the year 1843, the said Gainey being involved in debt, the said land was levied on, and sold at Sheriff's sale, by virtue of a *fi fa* amounting to fifty or sixty dollars; that, by a verbal agreement between the said Gainey Westbrook and the said Jesse Ward, the said Jesse Ward bid off said lot of land, at said sale, for the benefit of the said Gainey, and was to hold the same as an indemnity, until the said Gainey should refund to him the purchase price, and the interest thereon; that under, and pursuant to such agreement, the said Ward bought said land for about fifty or sixty dollars, when it was worth one thousand dollars; that said Ward bought said land, and took the Sheriff's deed thereto, by the agreement aforesaid, for the purpose of defrauding the creditors of the said Gainey, and shielding said land from the payment of said Gainey's debts; that, on the day of the Sheriff's sale, or a short time thereafter, the said Gainey, by payments, reduced the said pur

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chase price, due to said Ward, to about thirty or thirty-five dollars, which is all the claim or interest said Ward had to said land; that, when said land was levied on, by virtue of the fi fa issued from said decree against the said Gainey and the complainant, the said Ward interposed his claim to the same; that, upon the trial of the claim case, the plaintiff in fi fa was unable to condemn said property, and the same was found not subject to said fi fa; that Gainey Westbrook had been, for many years, and was then, wholly insolvent, having no property, except the land so held by Ward, as aforesaid, and that he died insolvent, and that no one has administered on his estate, or is likely to do so, as he left nothing to administer upon; that complainant has been compelled to pay off the said fi fa against the said Gainey and him, amounting to about seventeen hundred dollars; that the said lot of land, at the time of filing said bill, was worth thirteen hundred dollars, and is the only means left to the complainant to mitigate his loss as said Gainey's security; that complainant has been informed, and believes it to be true, that John S. Westbrook, a son of the said Gainey, is endeavoring to redeem said land, and that, by some arrangement, he has the title bond of said Ward for said land; that the said John S. Westbrook had full notice and actual knowledge of the fraudulent agreement between his said father and the said Ward, and is now endeavoring to perfect and perpetuate said fraud to the injury of the complainant.

The prayer of the bill is: That the defendants may discover the facts on oath; and that the Sheriff's deed to Ward, and the bond for titles from Ward to John S. Westbrook, may be set aside and be delivered up to be cancelled; and that the said lot of land may be sold, and the proceeds applied first to the payment of the balance of the purchase price due to said Ward, and then to the payment (as far as it will extend) of the fi fa against the said Gainey and complainant; and for general relief.

The answers of the defendants deny that any such agreement, as charged in the bill, ever was made between said Ward and the said Gainey, and that, if the same ever existed, John S. Westbrook had no notice or knowledge of the same, but that Ward bought the lot of land for himself alone. They also deny that Gainey Westbrook ever paid Ward any of the purchase money for said land. They also deny that

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the land was worth one thousand dollars, when sold by the Sheriff, but that it was worth only about two hundred dollars. They also deny that Gainey Westbrook remained in possession of said land after the Sheriff's sale, under any such agreement as charged, but insist, that he was the tenant of Ward, paying and promising rent up to the time Ward bargained the land to John S. Westbrook, and that, after that time, the said Gainey and his family remained on the land by the permission of the said John S. Westbrook.

The defendants, substantially, admit or ignore all the other material facts in the bill, but insist that the verbal agreement, charged in the bill, is void, because against the Statute of Frauds, and also insist that complainant, having failed to file his bill until after the trial of said claim case, that he is estopped and barred by the judgment in said claim case.

After the bill and answers were read, the complainant introduced the following testimony :

That, about the time of filing this bill, the complainant paid to the plaintiff's Attorney the full amount of the fi fa in favor of the Ordinary, for the use of the minors of Isaiah Warren against Gainey Westbrook, principal, and complainant, as security, amounting to about seventeen hundred dollars; that the defendant, Jesse Ward, told Thomas J. Hood, that he held the lot of land in dispute, and that he was holding it for the benefit of Gainey Westbrook and family; that Westbrook had paid all up but a small remnant, and that, when that was paid, he, Ward, intended to make a deed to the boys, so that it should be equally divided amongst them; that, on the same day, when what Ward had said was communicated to John S. Westbrook, he called upon the witness to bear the conversation and declarations of Ward in mind, as there might, some day, be a law-suit about it, and that he, Westbrook, believed Ward to be mean enough, at some future day, to try to defraud the children out of the land; that, at different times, between the years 1852 and 1854, the defendant, Ward, told Tandy D. King, that he bought the land in dispute at Sheriff's sale, and that some thirty or thirty-five dollars of the purchase money was still owing to him, and that, if he could get the money that was due him, that he had advanced toward the land, and could get back his bond that he had given to some of the Westbrooks' for the

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title of said land, he would make a deed; that, in frequent conversations with said King, in the years 1855 and 1856, the said Ward also told King, that, if the complainant would pay him three hundred dollars, he would make him a deed to the land, and risk his bond for titles; that Jesse Ward and Gainey Westbrook called on William J. Russell, the Clerk of the Superior Court, to go to his office to see the amount of a bill of cost that had accrued in and about holding said Westbrook's land; that the witness showed them the bill of cost, and that Ward said to Westbrook that he had that bill of cost, and some twenty-five or thirty dollars Attorney's fee, and that that bill of cost must be paid by him, Westbrook, and that, when that was paid, the land was his, Westbrook's, and that he, Ward, would make a deed to any one for him; that this occurred in the year 1851.

The complainant then closed his testimony, and the defendants introduced the following testimony, to-wit:

A note, signed by Gainey Westbrook, payable to Jesse Ward, or bearer, dated 10th of March, 1843, and due the 25th of December, 1843, for twenty-five dollars, with a credit thereon of fifteen dollars, dated 12th of June, 1844.

Also a note, signed by said Gainey Westbrook, payable to said Ward, or bearer, dated the 4th of January, 1844, and due the 25th of December, 1844, for twenty-five dollars, with a credit thereon of twenty dollars, dated the 11th of March, 1845.

Both of these notes purported on their face to have been given for the rent of lot of land number 141, in the seventh district of Fayette county.

Also a bond, signed by Jesse Ward, dated 26th of December, 1846, reciting a sale of said land by Ward to John S. Westbrook, for the sum of eighty dollars, and conditioned to make to said John S. Westbrook a title when the said purchase money should be paid.

Also the testimony of Bryan A. Westbrook, the son of Gainey Westbrook, and brother of John S. Westbrook, who testified: That, in 1852, he rented seventy acres of the lot in dispute from John S. Westbrook, and cultivated it that year, and paid him eighty dollars for it; that from the Sheriff's sale, in 1843, up to the sale from Ward to John S. Westbrook, the witness never knew his father to lay any claim to the land, and that his father rented the land from Ward

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that witness saw his father pay Jesse Ward twenty dollars in 1845, which the parties said was for the rent of the land: that the money was paid on a note, but whether it was on one of the notes read in evidence, witness does not know; that, from 1846 up to 1850, his father rented the land from his brother, John S. Westbrook; that, in 1850, his father ceased to cultivate the land, since which time his brother has rented portions of it to persons in the neighborhood; that the witness has no interest in the land, nor does he know of any of his father's children, except John S., ever claiming any interest in it; that, in 1846, the said John S. was a minor, nineteen years old, working for himself.

The testimony then closed, and the Court charged and refused to charge the Jury, as set forth hereinafter, and counsel for the defendants excepted.

The Jury rendered the following decree, to-wit:

"We, the Jury, find for the plaintiff, and decree that the Sheriff's sale be set aside, and the deed be rendered up within thirty days; also that the bond be rendered up in thirty days, and both to be cancelled, and that the Sheriff of Fayette county be directed to sell lot of land number 141, in the seventh district of Fayette, and the proceeds of the same to be applied as follows: first, that Jesse Ward be paid the balance of the purchase money, say thirty-five dollars, with interest, the balance to be applied to this execution, after paying cost of suit."

Counsel for the defendants moved for a new trial in said case, on the following grounds:

1. Because the decree in said case is contrary to Law.
2. Because said decree is contrary to the evidence and unsupported by the evidence.
3. Because said decree is strongly and decidedly against the weight of evidence.
4. Because said decree is too uncertain and indefinite in its terms to be enforced by any process of this Court.
5. Because the Court erred in refusing to charge the Jury, as requested by defendants' counsel, "that the parol agreement between Gaineey Westbrook and Jesse Ward, at the Sheriff's sale, as set forth in the complainant's bill, was void under the Statute of Frauds."
6. Because the Court erred in refusing to charge without qualification, as requested by the defendants' coun-

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sel, in writing, "that, if the Jury believe from the evidence and from the allegations of the bill, that the complainant was a party to the claim case referred to in the bill, then he is bound and estopped by the judgment in said claim case."

7. Because the Court erred in charging the Jury "that the sayings or admissions of one defendant are not evidence against his co-defendant, *unless* it appears by other evidence that there was a conspiracy between them to carry out a fraud, or that they were joint participants in a fraud," and in refusing to charge, as requested by defendants' counsel, "that in this case the sayings of Ward are not evidence against John S. Westbrook."
8. Because the Court erred in charging the Jury: "That mere inadequacy of price is not a sufficient ground for setting aside a contract as fraudulent, unless the inadequacy is so gross as to shock the conscience."
9. Because the Court erred in using the following language to the Jury, after recalling them for the purpose of giving a written charge, requested by defendants' counsel, and which the Judge had overlooked—"Gentlemen of the Jury, I have recalled you for the purpose of giving a charge which I had omitted to give, requested by defendants' counsel: when a charge is requested in writing, the Law requires me to give or refuse the charge, as requested; the defendants' counsel had handed me a written request to charge, which I had overlooked on account of its getting covered up by some other papers, and to avoid any future trouble in this case, I have sent for you to charge you upon that subject"—then proceeding to give the charge set out in the sixth ground of this rule.
10. Because the Court erred in charging the Jury—"That a *bona fide* purchaser for a valuable consideration is protected in Equity, provided he purchases without notice of any fraud, and without knowledge of any circumstances that ought to excite the suspicions of a reasonably prudent man, but if he purchases with notice of the fraud, or with a knowledge of such circumstances as ought to excite the suspicions of a reasonably prudent man, he is not protected."

11. Because the charge of the Court was erroneous in whole and in all its parts.

The Court granted the rule *nisi* for a new trial, but upon the hearing of the same, discharged the rule and refused the new trial, and the writ of error in this case is prosecuted for the purpose of reversing that decision.

GLENN & COOPER, for the plaintiff in error.

TIDWELL & WOOTEN, for the defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

The exceptions in this case go either to the charge of the Court, or to the verdict of the Jury. I will consider the former first, from number five to number eleven, both included, though this inverts the order observed in the bill of exceptions.

I do not deem it necessary to review these exceptions *seriatim*. The fifth and sixth complain of refusals by the Court to charge, as requested by defendants' counsel.

We justify the refusals to charge, as requested, on the points embraced, because the charges asked were not pertinent to the issue, and would, almost certainly, have confused the Jury, and diverted their attention from material to immaterial questions. We find no error in the charges positively given and excepted to.

The first, second and third exceptions assail the verdict of the Jury as against Law, against evidence, and as strongly and decidedly against the weight of evidence, and these we shall consider in connection.

We state the following proposition as the rule, which, in Equity, should govern this case: If the evidence develop a conspiracy between Gainey Westbrook and Ward, to secure the land in dispute to the former, or to his family, against the just claims of his creditors, and if John S. Westbrook subsequently became a party to this conspiracy, then, both the deed to Ward and his bond for titles to John S. Westbrook, should be set aside to let in creditors.

The allegation in the bill is: That this property, having been levied on to satisfy a judgment against Gainey Westbrook, in the year 1848, was purchased by Ward at a very

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inadequate price, at Sheriff's sale, with an understanding that Ward should hold the land for the benefit of Westbrook should permit him to reside upon and cultivate it, and Westbrook should, as speedily as possible, refund to Ward the purchase money, with interest; that Westbrook continued to reside on said land to the time of his death, in 1857, and that his surviving family continued to reside on it down to the filing of the bill, in 1857; that Gainey Westbrook paid to Ward a part of the consideration money; that in the month of December, 1846, Ward executed to John S. Westbrook, a son of Gainey Westbrook, then a minor, his bill for titles to said land, conditioned to execute titles to the obligee upon the payment of eighty dollars, with interest, and that this was a device more effectually to carry into effect the original covinous agreement between Ward and Gainey Westbrook—John S. Westbrook being cognizant of the understanding. The bill also alleges that, previously to these transactions, Gainey Westbrook had become the guardian of certain minors, named Warren, the defendant in error, Lambeth, being the security on his guardianship bond; that, as such guardian, Westbrook came to the possession of a sum of money, with a portion of which he had purchased the land in dispute; that suit had been instituted on the bond against Westbrook and defendant in error, as security thereon, judgment obtained and execution issued; that the plaintiffs had caused said execution to be levied on said land after the purchase by Ward, who had interposed a claim, the trial of which the property was found not subject to execution; that defendant in error had been compelled to satisfy said execution, as security; whereupon he filed the bill, praying that both the Sheriff's deed to Ward, and Ward's bond for titles to John S. Westbrook, may be set aside, the land re-sold, and the proceeds applied, first, to payment of the balance of purchase money due Ward, and the remainder to the reimbursement of himself, for the money paid as the security of Gainey Westbrook.

The answer of Ward explicitly denies the agreement with Gainey Westbrook, and all collusion and conspiracy; admits the receipt of money from Gainey Westbrook, but avers that it was received in payment of rent, due for the land in dispute, and avers that he had afterwards *bona fide* bargained and sold the land to John S. Westbrook. John S. W

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brook does not deny, but ignores, the original covinous agreement between his father and Ward, as alleged—averts that he was a *bona fide* purchaser, without notice, and denies all collusion and conspiracy.

No witness proves, of his own knowledge, the existence of the collusive agreement between Gainey Westbrook and Ward. But the witness Thomas J. Hood testifies: That, subsequently to the execution of Ward's bond to John S. Westbrook, and before the commencement of this suit, Ward told witness, that "he, Ward, held the land in dispute: that he was holding it for the benefit of Gainey Westbrook and family: that Westbrook had paid all up but a small remnant, and that, when that was paid, he, Ward, intended to make a deed to the boys, so that it should be equally divided among them." Witness, further, testifies: That, on the same day, he communicated this conversation to John S. Westbrook, who "called upon witness to bear in mind the conversation and declarations of Ward, as there might, some day, be a law-suit about it, and that he, Westbrook, believed Ward to be mean enough, at some future day, to try to defraud the children out of it." Tandy King testifies—"That, at different times, between the years 1852 and 1854, defendant, Ward, told witness that "he bought the land in dispute, at Sheriff's sale: that some thirty or thirty-five dollars of the purchase money was still owing him, and that, if he could get the money due him, that he had advanced towards the land, and get back his bond for titles that he had given to some of the Westbrooks, he would make a deed." Wm. J. Russell testifies that, "about the year 1851, Gainey Westbrook and defendant, Ward, came to his office (he being Clerk of the Superior Court) to inquire about a bill of costs, that had accrued in and about holding Westbrook's land, (doubtless referring to the claim case mentioned in bill and answer,) and that Ward told Westbrook, if he would pay the bill of costs, and twenty-five or thirty dollars Attorney's fees, the land was his, Westbrook's, and he, Ward, would make a deed to any one for him.

This testimony of three witnesses certainly negatives the answer of Ward, and fully justifies the verdict, as to him.

But it is insisted that Ward's sayings are not evidence against John S. Westbrook, his co-defendant. The latter is certainly bound by the declarations of Ward to the witness,

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Hood. On being informed what those declarations were, he expresses no surprise, no dissent from them, but, on the contrary, by calling on the witness to bear them in mind, that he might thereafter, in a certain contingency, testify to them Westbrook recognizes their truth, and adopts them as his own. Now, these declarations of Ward in effect establish the original covinous agreement between Ward and Gainey Westbrook—partial repayment, by the latter to the former of the purchase money—and Ward's intention upon being fully repaid, to make a title to Westbrook's *sons*, not to his *son*, John S. John S. Westbrook's adoption of this declarations, coupled with the fear expressed by him, that Ward would, at a future day, attempt to defraud, *not himself*, but "the children" of Gainey Westbrook, contradicts so much of his answer as ignores the original agreement, and the partial repayment of the purchase money by Gainey Westbrook also that portion which declares that he is a *bona fide* purchaser without notice. It, in fact, proves that he became party to this conspiracy to cover this property for the benefit of Gainey Westbrook and his family, of whom he was one. But, it is said, this is at most the testimony of but one witness, whereas, the rule of evidence requires either two witnesses, or one and corroborating circumstances, to overcome a positive denial in the answer responsive to the bill.

Are there not corroborating circumstances?

1st. There is the continued residence of Gainey Westbrook on the land, to his death, and of his family subsequently.

2d. The relationship between himself and Gainey Westbrook.

3d. His minority at the time of the execution, and delivery of the bond for titles, by Ward to himself.

4th. The fact that, after the making of this bond, he and father and Ward are found conferring together relative to the making of titles, not to John S., but to "some one fit the father," and Ward is found demanding, not of John S. but of Gainey Westbrook, payment of costs, and of Attorney's fees, accrued in the *holding* his, Westbrook's, land, preliminary to this making of titles.

It must not be overlooked that the defendant in error predicates his prayer for relief upon fraud, which he charges upon Gainey Westbrook and the plaintiffs in error, Ward and John S. Westbrook. Mr. Justice Story, remarking upon

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the different degrees of strictness in proof of fraud, required by Courts of Law and Courts of Equity, uses this language: "Courts of Equity will act upon circumstances, as presumptions of fraud, where Courts of Law would not always deem them sufficient proof to justify a verdict at Law." And in this connection, he quotes with approbation the following rule, laid down by Lord Hardwicke, in *Chesterfield vs. Jansen*—2 *Vesey*, 155: "Fraud may be presumed from the circumstances and condition of the parties contracting: and this goes farther than the rule of Law, which is: that fraud must be *proved*, not *presumed*." 1 *Story's Equity*, § 190.

This rule, applied to the position of John S. Westbrook, in this case, leaves him without a shadow of claim for protection.

We are of opinion that the evidence in the cause develops the state of facts embodied in the proposition with which we commenced an examination of this case on its merits, and that the verdict of the Jury, setting aside the deed and bond, and letting in the creditors, should not be disturbed. We think, moreover, that there is in it no fatal vagueness or uncertainty, as alleged in the fifth exception.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

DANIEL & JOHNSON vs. TRICE.

A. purchased from B. certain hides, in vats, at a stipulated price per hide of an assumed number, with the understanding that there should be made of them, and if they fell short of the number assumed B. should account to, or pay A. for the number deficient, at the price fixed. A. being made, the number was found deficient. A. raised an account against B. for such deficiency, in accordance with the agreement, amounting \$51 00. To a suit afterwards brought by B. against A. on a note, A. pleaded, first, failure of consideration, in that the note sued on was given in consideration of the hides, setting out the agreement and the ascertained deficiency. He also pleaded his account, so raised against B., as a set-off. The proof of the consideration of the note was not clear; but the proof of the hides, the agreement, and deficiency, as stated, were clearly made out. *Held*, that A. was entitled to the allowance of his demand, under one or the other.

Debt, in the Superior Court of Spalding county. Tried before Judge CABANISS, at the May Term, 1860.

Thomas C. Trice instituted an action of debt in the Superior Court, against Daniel & Johnson, to recover amount of an obligation by which the said Daniel & Johnson acknowledged themselves bound to pay said Trice the sum of fifty dollars, by the 25th of December, 1852; said obligation being dated the 8th of January, 1852.

The defendants pleaded to said action, that they purchased from the plaintiff a certain quantity of leather and hides in the vats of a Tan-Yard, in the city of Griffin; and that it was agreed between the parties that the said hides should be estimated at one dollar and fifty cents per piece, and that when the hides were counted out, the pieces fell short of the number sold and set out in the vat-book of the Tan-Yard; that the plaintiff should pay defendants for the deficiency, that if the pieces exceeded the number so sold, the defendants should pay for the excess, at the estimate aforesaid; that the hides did fall short, to the amount of fifty-one pieces; that the obligation sued on, was given for a price at the purchase price of said hides, and that the consideration thereof had wholly failed.

The defendants also pleaded the said deficiency in the number of hides and pieces of leather, in the form of a set-off.

On the trial of the case the plaintiff introduced the obligation sued on, and closed.

The defendants then proved the purchase of the leather and hides, by the defendants from the plaintiff; that the number was taken from the vat-book of the Tan-Yard, and the hides were estimated in the trade at one dollar and fifty cents a piece; and that it was the contract and agreement of the parties, that if the leather and hides should fall short of the number sold, the said Trice should make up and pay to the defendants the deficiency; and that if the leather and hides should exceed the number sold, the defendants should pay to said Trice, for the excess, at the same price of the aforesaid estimate; that when the leather and hides were worked out, the number was less than the number sold, by thirty-four, and amounting in value, according to the estimate, to fifty-one dollars.

There was some uncertainty in the testimony as to what the obligation sued on was given for.

There was also some conflict in the testimony as to other points, but none as to the liability of Trice to account for any ascertained deficiency of hides.

The testimony being closed, the presiding Judge charged the Jury as follows, to-wit:

The defendants must make out the defence on which they rely. They have pleaded both a failure of consideration and set-off. The plea alleges, that the note was given for hides, in the vats of a Tan-Yard; that the vats were represented as containing a specified number of hides, which were sold at a specified price per hide, and that the agreement was, that if there should be a deficiency in the number of hides represented to be in the vats, there should be a deduction from the amount of the sale, according to that deficiency and rate per hide at which they were sold; and the defendants allege that the deficiency in the number of hides in the vats, at the price per hide at which they were sold, is more in amount than the principal of the note sued on, and that there is, therefore, a total failure of consideration. They insist farther upon the plea of set-off, that if the consideration of the note be some other than the hides in the vats, still they are entitled to set-off against the note sued on, the amount due them on account of the deficiency in the number of hides represented to be in the vats. And the Court

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charges you, that under the agreement between the plaintiff and defendants, these two pleas amount, virtually, to the same thing. To sustain either, the consideration of the note must be shown to be the hides in the vats of the Tan-Yard, sold by the plaintiff to the defendants, and that the vats were represented to contain a specified number of hides which amounts to a warranty that they contained the number specified; and it must further appear by the evidence that they fell short of the number. If these facts have been made to appear by the proof, the defendants are entitled to relief, according to the deficiency of the number of hides in the vats. If the deficiency is equal to or greater than the principal of the note sued on, there is a total failure of consideration, and you must find for the defendants. If less than the principal of the note, then deduct the amount of the deficiency, whatever it may be, and find a verdict for the plaintiff for the remainder. If the defendants have failed to prove the consideration of the note to be the hides in the vats of the Tan-Yard, then find for the plaintiff the principal and interest due on the note with cost of suit. If the consideration of the note is some other than the hides in the vats of the Tan-Yard, sold by plaintiff to defendants, then the plea of set-off, arising from the deficiency in the number of hides, cannot be allowed against this note.

To this charge the defendants, by their counsel, excepted.

Counsel for defendants requested the Court to charge the Jury as follows:

"That if they believed that the defendants had shown that there was a deficiency of hides in the vats, and it was the contract between plaintiff and defendants that the plaintiff was to account for the deficiency, then the jury might find for the defendants under the plea of set-off, even if the evidence showed the consideration of the note to be some other than the hides in the vats."

The Court refused to give said charge, and remarked to the Jury, that if defendants recovered at all, it must be under the plea of failure of consideration.

To which charge, and refusal to charge, counsel for defendants excepted.

The Jury rendered a verdict for the defendants with cost of suit.

Counsel for the plaintiff then moved for a new trial in said case, on the following grounds:

1. Because the verdict of the Jury was contrary to Law and the charge of the Court.
2. Because the verdict of the Jury was without, and contrary to the evidence in said case.
3. Because there was no mutuality in the set-off relied on in the defence, and the proof showed that only one of the defendants, Egbert P. Daniel, was entitled to said set-off, and that the same did not grow out of, nor was connected with, the consideration of the note sued on in said case.

The presiding Judge sustained the motion and awarded a new trial on the grounds:

1. That the verdict was contrary to, and without evidence to support it: and also contrary to the charge of the Court.

To this decision of the Court, granting a new trial, the defendants excepted and now allege the same to be erroneous.

PEEPLES & MARTIN & DISMUKES, for the plaintiff in error.

ALFORD, for the defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

The question in this case is, whether the new trial was properly granted.

The Court below ordered a new trial on the grounds:

1. That the verdict was contrary to evidence.
2. That it was contrary to the charge of the Court.

Upon the first point, we think the evidence fully sustains the verdict. There was no contest as to the cause of action of the plaintiff in the Court below: *that* was not disputed. The defendants had two defences—failure of consideration, and set-off. The verdict of the Jury, therefore, must be understood as affirming, either that defendant proved a total failure of consideration, or that he established a set-off equal in amount to plaintiff's demand. The two demands were, in fact, very nearly equal. The proof of defendants' demand consisted in this: that they had purchased of Trice, the plaintiff below, certain leather, and certain hides, in vats, in the process of tanning—the hides being sold at \$1 50 each—and the number taken from the vat-book, subject to correc-

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tion by a subsequent count; the agreement being that if, on count, the number fell short of that assumed, Trice should account to D. & J. for the deficiency, at the price fixed, and if it was over, D. & J. should pay for the excess, at that price. The evidence establishes a deficiency which, at the price fixed, makes T. liable for \$51 00. The amount of the plaintiff's demand was \$50 00. The consideration of the note sued on by plaintiff below was, undoubtedly, either the hides so found deficient, or certain leather sold by T. to D. & J. at, or near the same time. If these sales of hides and leather were one transaction, and the note given in part payment, or if they were different transactions, and the note were given in part payment for the hides, in vats, then the defendants below were sustained on the plea of failure of consideration. If D. & J. had fully paid for the hides, in vats, and the note were, in fact, given for leather, or other thing sold at a different time, then defendants below had a right, under our Statute, authorizing sets-off at law (*Cobb's Digest*, 487,) to raise and plead as a set-off to this or any other action of Assumpsit or Debt, brought by this plaintiff against them, an account for this deficiency of hides. They did so plead, and proved their account. It is true that the Jury did find against the charge of the Court, on the hypothesis that the hides, in vats, were not the consideration of the note; and it is true that the proof is by no means clear that they were so. The Court below charged the Jury, that they could not find for defendants on the plea of set-off, and that if defendants failed to prove that the hides in the vats were the consideration of the note sued on, they must find for the plaintiff the amount of his note, principal and interest. In this, for the reasons given, we think that the Court erred—that the verdict of the Jury was right—and should not have been disturbed.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below ordering a new trial be reversed, and the verdict of the Jury confirmed.

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1. When the verdict of the Jury is strongly and decidedly against the weight of evidence in a criminal case, the Court will order a new trial.
2. It is justifiable homicide to kill one who intends, by violence, to commit a felony upon the person of another.
3. When the circumstances are such as to excite the fears of a reasonable man, in the absence of all other proof to the contrary, the law will attribute the killing to these fears, and not to revenge or passion.
4. When a homicide is committed with a deadly weapon, and the slayer is indicted for murder, it is competent for him to prove that he came by the weapon accidentally, or for an innocent purpose, on the occasion.

Indictment for Murder, in Newton Superior Court. Tried before Judge CABANISS, at the March Term, 1860.

At the September Term, 1859, of the Superior Court of Newton county, a bill of indictment was found true by the Grand Jury, charging and accusing Richard Aaron, otherwise called Richard Bryant, with the Murder of James H. Reynolds.

On the trial of said case the following testimony was introduced in behalf of the Commonwealth, to-wit:

BURRELL BORDERS, sworn: Witness was at James Reynolds', on the 22d of August, in the year 1859. James Reynolds lived in Newton county. Witness went to Reynolds', and he, Reynolds, was sitting on the fence, and Richard Aaron, James Aaron, John Aaron, and William Lawson, came out of the woods to where we were sitting; they proposed a game of marbles. Richard Aaron said he could take his partner and beat any other two, for a quart of brandy. John Aaron said he would take the bet, if he could get a partner. John Aaron asked witness to play with him, and also William Pennington, but we refused. He then asked James Reynolds, and told him if he lost he would pay for the brandy. Reynolds said he would play for accommodation, but would have nothing to do with the bet. John Aaron said he would pay for the brandy if they lost it. They then entered into the game; John Aaron and James Reynolds beat the first game. They proposed another game but the boys refused, and James Aaron said he would give

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them two in five to play. They then engaged in a second game, and James Reynolds was getting ahead; John Aaron threw his marble up near the ring, when his time came to shoot; his marble flew back and hit his hand; he said he said "vence," but James Aaron said that he said "kicks"; then they got to disputing about it. James Aaron walked up and stepped into the ring, and swore he (John) should not shoot. James Aaron gave John Aaron the damn lie. John Aaron then struck him, or struck at him, witness does not know which. Watters and deceased took hold of James Aaron, and Prisoner took hold of John Aaron. John Aaron told Prisoner to let him loose, if you don't I will cut you loose. Richard Aaron pulled him two or three paces and turned him loose, and shoved him from him. Richard Aaron then walked back a rod or two, and placed his hand in his pantaloons packet. John Aaron and James Aaron seemed as if they wanted to get together again. Deceased caught John Aaron and pulled him back some five or six feet; he then turned him loose and stepped off three or four steps; everything was silent for a moment. Richard Aaron drew his pistol out by his right, and placed it in his left hand, and fired. At the firing of the pistol deceased holloood, I am a dead man! I am a dead man! Deceased passed by Watters and said, Oh! Andrew, I am a dead man! As soon as witness saw he was shot he started to him, but could not get to him. Deceased tried to prevent his falling to the ground. Witness and deceased's wife both got to him at the same time. Deceased said to his wife, I am dead, I do hate to die so bad. Witness don't think deceased lived more than five minutes from the time he was shot. This transaction occurred in Newton county. Richard Aaron and John Aaron are half-brothers. The parties were a west course from the house, about 40 yards from the house. James Aaron and Richard Aaron were about 4 or 5 yards apart. John Aaron was from deceased five or six feet; the parties were in a position of a triangle. John Aaron was with his side to Richard Aaron, was not looking at him at the time the pistol fired. Deceased was some farther off from Richard—he was some ten yards from him. Prisoner went off to the woods as soon as the pistol fired. James Aaron went with him; John came back to where deceased was, for Watters to go to prisoner. Deceased was wounded in the left breast, just below the collar

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bone. Witness examined the wound; the ball was a large size for a pistol, and passed through the body to the skin of the back; the wound bled, and was spouting out blood when deceased died. The pistol was held somewhat straight out from the body.

Cross Examined.—The marble ring was three or four panels above the gate; the pistol was a small-sized one, not more than four inches long. Witness saw the pistol. If witness said to William Aaron a day or two after the transaction, in a conversation near his house, that he did not see any one with a pistol that day, he does not recollect it. Witness does not remember how long after the shooting before the Coroner's inquest was held. If witness swore before the inquest that he saw a pistol, he does not recollect it, if the question was asked he does not recollect. Witness swore upon that occasion that he heard the report of a pistol or a gun. Witness don't think he said he thought that the shot was fired from a weapon in the hands of Richard Aaron. Witness was looking at all three of the men when the pistol was fired. Witness did not tell W. Aaron, in a conversation that occurred near his house a day or two after the shooting, that the boys were on the spot when he got there. Witness thinks he told W. Aaron, in the same conversation, James Reynolds took hold of John Aaron. The left hand of prisoner is about four inches across the palm. Witness never had seen Richard or John Aaron either, before that day. Witness was so excited he might have made a mistake before the Coroner's inquest. The accident happened near sundown; the inquest was not held until night; does not know what time in the night the inquest was held. Witness had been on the fence a half hour or more before the accident happened. Witness heard no words of unkindness until John and James fell out about venge and kicks; all seemed perfectly friendly, so far as he knew. When John and James fell out, deceased took hold of James and prisoner took hold of John. Witness did not see John Aaron turn round towards Dick. *Richard Aaron seemed anxious to quell the difficulty.* When Dick let John loose, he went backwards from John; at the time Richard Aaron let John Aaron loose, deceased let James Aaron loose, and approached towards John Aaron. John Aaron turned towards Dick, with his knife about half open; the pistol did fire at the

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time deceased approached John Aaron. Witness did not tell Wm. Aaron in the conversation above referred to near his own house, a day or two after the accident, that James Reynolds said, Dick you have shot me, and Dick replied, Jim if I have it was an accident, for I have nothing against you. They had the brandy at the mouth of the lane, about 75 yards from the house. Witness and deceased were brothers-in-law. Witness did not testify at this examination that the boys came up out of the woods, immediately proposed a game of marbles, but after they had been there half an hour they came by.

Rebuttal.—Witness' position was about ten feet from John and Richard Aaron, was on a line with John and W. Deceased was off to the right. Witness was not excited until after the shooting, and was still on the fence until after the shooting. Witness was sitting so he could see all parties clearly and distinctly. There was no conversation between deceased and prisoner after the accident at all. Witness did not see prisoner after the accident.

Sur-Rebuttal.—Before the accident they were all talking friendly, John Aaron was standing between Dick and Jim Aaron.

HOWELL P. REYNOLDS, sworn.—Witness' father was named James Henry Reynolds. On the 22d August last I was at home. Mr. Watters, Border, W. Pennington, W. Lawson, John, James, and Richard Aaron were there. There was a game of marbles played that day there. When Mr. Borders came up, John, James and Dick Aaron, and Mr. Horton came up from the woods. Dick Aaron said he could take his partner and beat any other two for a quart of brandy. John asked Mr. Borders if he could play, and he (Borders) said he could not; he asked Mr. Pennington, and he said he could not play; he asked deceased, and told him that if he played he should pay nothing of it, for he would pay it all. Deceased said, now boys, I am not going to pay for any of the brandy. They played two games, deceased and John were beat, and they paid the brandy. They started off and came back and played another game, five up. Before they got done John dropped his marble close to the ring, and when John shot, his marble hit his fingers, and John said *venoe*. James said he never said it. James said he would die before he should shoot his marble, and John said he would die be

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fore he would kick it. Then Jim told John he was a damn liar, and John struck at him, and deceased stepped in between them to part them. He caught hold of Jim to hold him, and Dick Aaron caught John right round the waist and pulled him down in the woods a piece. Deceased and Watters held Jim. John told Dick if he did not let him loose he would cut him, God damn him. Dick shoved John off as he let him loose, and John went off two or three steps, and got his knife almost half open, and started after prisoner; deceased caught him and turned him half round. John started towards Dick; prisoner stepped backwards on a rock, deceased stepped to him, John Aaron, and turned him sorter round. They were all standing still, and Richard Aaron ran his hand in his pocket and pulled out his pistol, and held it in both hands to one side and fired. Deceased said now you have killed me. Dick went off to the woods, and witness saw no more of him. John was trying to get to Dick; he turned the pistol in his left hand, with the right one in the direction of deceased. Witness says prisoner is the man who killed his father. At the time of the firing all were standing still; as soon as the pistol fired prisoner ran off, and left his coat, and Jim Aaron carried it to him, and that is all.

Cross Examined.—Witness is in his 13th year. Uncle Borders was sitting on the fence; the boys had been there all day. Deceased went to the store, and the boys came back, and some of them ate dinner there. Deceased and all of them were very friendly. When deceased was shot he did not hear prisoner say I am sorry I shot you, for I have not got anything against you. Deceased was not standing close to John. John started towards Dick, and deceased caught hold of him and turned him sorter round. Prisoner never said, as witness heard, "John, don't rush on me with that knife." Witness was not looking at either particularly, but was a little agitated. Dick and John were looking at each other. Dick pulled out his pistol, and held it to one side. The pistol fired in his hand. Immediately upon the pistol firing deceased said, you have shot me. Witness looked at him, and ran up to him, and noticed nothing else. Witness stayed with his father until they carried him into the house, and all the others went off except Horton and Borders.

Rebuttal.—The crowd did not stay there all day; Dick

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did not take dinner there. Witness saw Dick turn and off; it was the last he saw of him. John was standing e ways to Dick when the pistol fired. The ground sloped; Dick was down on the lower side. John and James A ate dinner.

The evidence for the State closed, and defendant introduced the following testimony, viz:

Evidence for the Defence.

WILLIAM PENNINGTON, sworn: He was present at time of the difficulty, at James Reynolds', in the month August; it was August 21. There was a good many o boys there; they got up a game of marbles. John A and James Reynolds were partners against Dick and James Aaron; they played several games, and concluded to one game more, five up. They played until the game four and four; and in playing the fifth game John A shot and knocked a man out of the ring, and his taw bow back and struck his hand. James said kicks; John sai should not kicks it at all; James said he should kick. At that time James stepped into the ring between John the men, and said he should not shoot unless he kicked taw. John said he would not kick it an inch; at this James Aaron picked the marbles up out of the ring. James Aaron said, this may cost you a damn sight more than James Aaron said, it may cost you something too. At time the lie was passed between James Aaron and Aaron once or twice, but witness does not recollect the e words. James Reynolds was sitting on the fence, and jux down, as it appeared that John and James were going to er. Deceased caught hold of James, pulling him off the ring towards the fence, and prisoner caught hold of John Aaron told prisoner to let him loose. Prisoner John round the body, and was behind him. John told oner the second time, God damn you let me loose. At time prisoner shoved him from him. John Aaron dr small, white handle knife; as he drew from his po opened and turned his face toward prisoner, he adva towards him, with his knife open in his hand. John A advanced towards prisoner at the same time. Dece seeing John Aaron, made as though he was trying to between prisoner and John, passing to the right of

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Aaron about three feet. Prisoner drew a pistol from his pants pocket; as he drew it from his pocket with his right hand, and let it fall into his left, it fired. In a short space of time after the pistol fired, deceased turned round and said, I am a dead man. Deceased advanced but a few steps towards his own door, his wife met him, and he dropped down and died. Prisoner drew his pistol from his pocket with his right hand, and let it fall across the palm of his left, and it fired. Prisoner's thumb of his right hand was on the hammer. Prisoner held the pistol laid across the left, with the thumb of his right hand on the hammer. From the position of his eyes, prisoner was looking at John Aaron. Witness did not hear prisoner say anything to John as he was advancing towards him with his knife. All of us met a while before dinner, at Webb's Store, and went from there to the house of the deceased. All were perfectly friendly, as far as witness saw. John Aaron, James Aaron, and Thomas Lawson, ate dinner at the house of deceased.

Cross Examined: Prisoner went to mill and carried grain that day. It was after dinner when they commenced playing marbles. Prisoner pulled John some three feet, but did not get to where taw was. Deceased pulled James almost five or six feet in an opposite direction from prisoner and John. Prisoner shoved John up the hill when he had turned him loose; he shoved him up very close to the ring. Prisoner stepped some several steps back when he pushed John from him. John was up near by the ring, and prisoner was near at taw when the pistol fired. Deceased was not nearer than three feet to the right of John when the pistol fired. Prisoner and John were some eight or ten feet apart when the pistol fired. John's face was towards prisoner when the pistol fired. Witness was looking at prisoner when the pistol fired. Witness was looking at prisoner's eyes and face when the pistol fired. Witness was standing to the right of the ring when the pistol fired, some ten or twelve feet. John's side was towards witness. Prisoner was standing so witness could see his face. Deceased was standing near the fence, but was not sitting on the fence. Witness saw prisoner from the knees up, when he was looking at him at the time of the firing. Witness would have corrected his statement about the fence at the time if he had had time.

ANDREW J. WATTERS, sworn: Witness was present when

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the unfortunate affair happened at the house of deceased: found the party at the house of deceased about an hour by sun that evening; they were playing marbles when witness got there. James Aaron and prisoner were partners against John Aaron and deceased. They were playing for a quart of brandy and half a dollar. John Aaron was betting brandy; deceased was not himself betting. They finished that game, and commenced another for the same amount. They were playing three up. After they got through playing the second game they stopped for a while, and commenced another in which the dispute arose. The dispute was between John and James about a shoot John made, his marble bouncing back and striking his fingers. James said he told John to kicks first. John said he said vance first. James Aaron stepped into the ring to keep John from shooting unless he kicked his marble. Witness' brother spoke to them and said he would pay the quart of brandy, rather than see them have a difficulty. Witness spoke to James and told him to get out of the ring and let John shoot, and he said he would die first. Witness then told John to kicks one foot and a half, and he said he would be damned if he kicked it an inch. James then picked up the marbles out of the ring. John straightened up; prisoner was standing off towards taw from the ring, some two feet. John Aaron, when he got up, said to James, it will cost you both a damned sight more than it is worth. James said, by God it may cost you something too. John then said something, but witness did not understand him, and James called him a damn liar. As he gave him the damn lie, John struck at him, and deceased shoved them apart. Deceased kept hold of James after he had parted them, and prisoner went up to John's back and caught him around the arms. James Aaron and deceased stayed close to where the ring was. Prisoner and John shuffled off below, a little piece towards taw mark. John told prisoner to turn him loose. God damn you turn me loose, if you don't I will cut you loose: and witness thought he was trying to get a pistol out. at the time he told him he would cut him. Prisoner turned him loose, and shoved him off from him, and John drew out a knife. Witness got off the fence and went to where deceased and James Aaron were standing. John Aaron was right opposite to where we were, and turned facing of us.

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Witness thought that he was coming at James, but instead of that he turned short around and broke at prisoner, with his knife raised in a striking position, in his right hand. Prisoner commenced backing as John ran towards him, and drew his pistol, and it fired instantly. Prisoner caught the pistol in both hands as he drew it out of his pocket, and it fired. Deceased was three or four feet to the right of John when the pistol fired. John came to a halt and stood firm a few seconds; he then started towards prisoner and said, God damn you, you had better shoot again. About the time he made this remark deceased said, O, I am dead. Deceased turned and run to witness and said, Andrew, I am dead, send for a Doctor. He passed by witness, and met his wife near the gate and said, O, I am dead, I am dead, and sunk down at her feet; while he was falling he said, Oh! I hate to die so bad. When witness turned around prisoner was gone. but witness does not know when, or which way he went. Deceased was stretched out on the ground, and he died directly. Prisoner pulled the pistol out with his right hand, and threw it across his left, with the thumb of his right hand on the hammer. it was not directed to any one. There was no words of difficulty between deceased and prisoner. They were all enjoying themselves while witness was there; they were all friendly. Prisoner was looking at John when the pistol fired.

Cross Examined: Prisoner and John were some eight or ten feet apart at the time of the firing. Deceased and prisoner were about the same distance apart. The pistol was not a self-cocking one, but was a Colt's Repeater of the latest pattern. John Aaron and James Aaron went with witness to where prisoner was that evening; witness' brother was also with him when he went.

Rebuttal.—Witness saw prisoner that evening about five minutes after the occurrence. When witness got to prisoner he was about one hundred and fifty yards from the house, in the road. Prisoner sent James Aaron after witness; witness met Pennington coming back. When witness got to where prisoner was, he appeared very much excited. Pistol shown in Court is the same pistol, or one like it. John Aaron remained with deceased until witness went to where prisoner was. and then went with witness down to where Dick and John Aaron were. Was nearest to prisoner when the pistol fired.

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JOHN L. AARON, sworn: Witness was at the house of deceased when this unfortunate affair happened. Met deceased about 10 o'clock at Newton Factory, at the Store, that morning. Pennington and Major Floyd were there. James Aaron and prisoner were with witness. Stayed at the Factory about one and a half, or two hours. When we left the Store, we went to Major Floyd's buggy to get a drink of rum; but prisoner said he could not drink rum, he wanted brandy. Deceased went there with us. Jim said he had rather have his dinner than anything else—that he would give a half dollar for his dinner—witness said the same. Wm. Lawson said he would get our dinner for half dollar. Deceased said if we would go home with him he would have a chicken killed and fried, or cooked any way we wanted it. Witness and prisoner, and James Aaron and deceased, all went there together. Wm. Lawson and Pennington came on behind us. When we got there we bought a quart of brandy and drank that, and deceased went to the house and had a chicken killed. He came back and said dinner was ready. He, witness, and Thomas Lawson went to dinner; they then came back down there, and knocked about the fence there until the sun was about two hours high; then we got up a game of marbles, and played some three or four games; we were playing for a quart of brandy. In that time the sun was nearly down, and we all had started home. Deceased called to witness and said, if they will give us one in five we will play for another quart; and witness asked if he would go his halves, and he said he would; and then we all came back and went to playing, and played on until the game got four and four, and witness rolled up on one side of the ring, and brother Jim rolled up on the other. Witness made a shot and his marble struck his hand. Witness said vance, and Jim said kicks; witness said he said vance first, and Jim said he said kicks first, and we got to quarreling about it. James came and got right in the ring and would not let witness shoot, and then picked up the marbles, and witness said, it would cost you and prisoner more than it is worth, and he said it will cost you something too. Witness then said something to him, but does not now recollect what, and James gave witness the damn lie, and witness struck at him. Deceased ran up and caught hold of Jim, and prisoner ran and caught hold of witness. Witness told prisoner to turn

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him loose, and he held on to witness, and witness said again, turn me loose; witness said, if you don't turn me loose I will cut you loose, and prisoner saw that witness was trying to get out his knife, and he shoved witness off from him. Prisoner had witness around both arms. Witness pulled out a little white handle knife, opened it, and started back towards prisoner. Deceased saw that witness was going to prisoner, turned James Aaron loose, and came toward witness to catch him (witness.) Prisoner kept backing, and drew out a pistol, and held it in both hands, and it fired. Deceased was about three feet to the right of witness. Deceased said, Dick, you have shot me; and prisoner said, Jim, I would not have shot you for the world, for I have never had a harm word against you. Gentlemen, you know I did it accidentally. Then deceased turned round and said, O, I am dead, I am dead, I am dead. Prisoner and deceased were friendly all day; just as friendly as witness and prisoner were. Defendant proposed to prove why it was he happened to have the pistol on that occasion. State objected. Court sustained the objection, and defendant excepted, and now assigns the same as error.

Cross Examined: Witness is half-brother of prisoner. Prisoner was about seven or eight feet from the ring when the pistol fired. Witness was about four feet from the ring, to the left of it. Prisoner was seven or eight feet from the ring. Deceased was about seven or eight feet from prisoner. Deceased was about three feet to his right, coming to catch him from getting to prisoner. Witness was advancing upon prisoner, and at that time deceased had hold of James. Witness did see the deceased and James at the time he was advancing upon prisoner. Witness don't know that deceased had hold of Jim. Deceased was to the right of witness, and not to his back. Witness never saw deceased at the time the pistol fired. Witness don't know whether deceased was advancing to stop him or not. At the time the pistol fired witness was looking at prisoner, but turned and saw deceased coming to his right; and witness had to turn around to get at prisoner. Witness had stopped when he turned round and saw deceased, and then witness advanced about one foot before the pistol fired. After he stopped, witness said to prisoner, you had better shoot again, but did not swear. Witness stopped when the pistol fired. The first thing de-

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ceased said after he was shot was, Dick, you have shot me. Dick spoke so he supposed they could all hear him; prisoner said, Jim, I am sorry I did it, I would not have done it for the whole world. Gentlemen, you know I did it accidentally. Prisoner spoke loud enough, as witness supposes, for all to hear him. Immediately after the firing prisoner walked off fifty or one hundred yards. Witness remained with deceased until he died. All except prisoner and Thomas Yancy stayed upon the ground until he died. Don't know whether Jim stayed or not. Borders was sitting on the fence when the difficulty commenced. When prisoner pushed witness off, Jim was about five feet off. Prisoner, Jim and witness all left the ground together that evening. Prisoner kept out of the way of the officers.

Rebuttal.—Immediately after the firing, prisoner left, because some one told him to leave. When the pistol fired, prisoner was looking at witness.

Sur-Rebuttal.—Don't know that any one advised prisoner to leave.

W. H. AARON, sworn: Witness had a conversation with Burrell Borders near his house, two or three days after the transaction. Borders told witness then and there that he, Borders, did not see any pistol, at the time of the difficulty, in the hands of any one, but heard the report. He said that deceased said, you have shot me, and that prisoner said, Jim, if I have, it was an accident, for I have nothing against you. This is what he said, according to the recollection of witness.

Cross examined: Witness is uncle to prisoner, and has been assisting the defence on the present trial. Witness had talked about the trial among the Aarons a good deal; have talked with all the witnesses, that have sworn, except Howell Reynolds. Don't recollect what day the occurrence took place, or what day witness talked with Borders; thinks it was two or three days afterwards.

JAMES HORTON, sworn: Witness was there at the time deceased was killed, and heard the commencement of the quarrel between John and Jim Aaron; prisoner took hold of John. Deceased took hold of James, they got to disputing about the game of marbles; James put his foot in the ring and said John should not shoot; John said he would be damned if he didn't shoot; other remarks were made, which witness did

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not distinctly heard; the damn lie was passed, John A. made an attempt to strike James, prisoner caught John A. right around the arms, and deceased caught James and kept him on the other side of the ring, John said to prisoner if you don't let me loose, I will cut you loose, and made two or three attempts and got his knife out, prisoner then turned John loose, and shoved him up the hill; John was going towards prisoner with his knife drawn, and prisoner backed down the hill and drew his pistol. John was going towards prisoner, deceased let James loose and went directly across to where John was; deceased did not get in reach of John before prisoner drew his pistol out of his pocket and held it in his right hand, thrown across the palm of the left, and it fired; deceased turned and walked some two feet towards Watters and said: Andrew, I am dead, I am dead; Mrs. Reynolds had got out, and they embraced each other, and deceased said: oh, honey, I am dead, how I hate to die; witness was looking at the parties: prisoner's thumb, he supposed, to be on the cock of the pistol: they were all friendly that day, so far as witness saw.

Crown examined: Prisoner and deceased were some six or eight feet apart. John was something like side-ways to him: James A. was some fifteen or twenty feet from prisoner, deceased passed across in a fast walk or run: prisoner and John were some eight or ten feet apart when John drew his knife: John had not stopped when the pistol fired: witness was sitting on the fence when the pistol fired: don't know that the difficulty between them was a sham; never said boys let them alone, they are in the habit of doing so; as soon as the firing took place, deceased turned round up the hill: witness heard all that was said and stated all he heard: something might have been said that witness did not hear, but witness thinks he heard most of the conversation; he is some relation to the deceased; defendant offered to prove why it was he had the pistol on this occasion, to rebut the presumption of any preparation for crime and of malice: State objected; Court sustained the objection, and defendant excepted, and now assigns the same as error. Pistol in evidence. Here the defence closed. After the charge of the Court, Jury retired and returned a verdict, finding defendant guilty of Voluntary Manslaughter.

We agree that the foregoing is a correct and substantial

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copy of the evidence in the case adduced on the trial, March 29, 1860.

GEO. T. BARTLETT, } Defendant's Attorneys.
JOHN J. FLOYD, }
A. G. HAMMOND, Solicitor General.

After reading all the sections of the Penal Code applicable to the case, the Court, among other things, charged the Jury that, before they could find the defendant guilty of Murder, they must be satisfied, by the proof, that he was actuated by malice expressed or implied: there can be no murder without malice. The characteristic distinction between Murder and Manslaughter is the want of malice in one case, and its existence in the other. But every homicide is presumed to be malicious until the contrary is shown, so that any homicide will, in legal contemplation, amount to murder, unless it be excusable on the ground of accident, or because done in self-defence, or alleviated into manslaughter by concomitant circumstances; and whether it was committed wilfully and maliciously, or under circumstances justifying or excusing it, or alleviating it, and reducing it to manslaughter, are questions for the consideration and determination of the Jury, and to be determined from the evidence before them. You will, then, look to the testimony to satisfy yourselves whether the defendant was or was not actuated by malice in killing the deceased. Malice, in legal contemplation, means doing a wrongful act intentionally and without sufficient cause or excuse. If you believe that the defendant intentionally and maliciously killed the deceased, he is guilty of murder, and you should so find. If he intended to kill John Aaron, and the circumstances proven are such as to show that it would have been murder if he had killed him, and in attempting to kill him he killed Reynolds, then he is guilty of murder, and you should so find. But if he did not intend to kill Reynolds but John Aaron, and if it would not have been murder had he killed him, then his killing the deceased is not murder; and if you come to that conclusion, you will next inquire whether the facts in proof show it to be a case of manslaughter, either voluntary or involuntary. In this branch of the case, the question for you to consider and determine is: would the defendant have been guilty of manslaughter had he killed John Aaron? If John Aaron was attempting to commit a serious

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personal injury upon the defendant, and the defendant, under a sudden, violent impulse of passion, had killed him, the killing in such a case would have been voluntary manslaughter; and if, under such circumstances, he killed Reynolds instead of John Aaron—if the shot was intended for John Aaron—then the killing of Reynolds was voluntary manslaughter, and you should so find. But if the killing was without any intention to do so, but in the commission of an unlawful act or a lawful act, which might produce such a consequence in an unlawful manner, in such case the offence is involuntary manslaughter. There are two kinds of involuntary manslaughter; and if you believe, from the testimony, that the defendant killed the deceased without any intention to do so, but in the commission of an unlawful act, which might produce such a consequence in an unlawful manner, then you should find him guilty of involuntary manslaughter—one in the commission of an unlawful act, and the other in the commission of a lawful act, without due caution and circumspection. If there was no intention to kill, but the killing was the result of an unlawful act, that is involuntary manslaughter; or if the killing was the result of a lawful act, in which the necessary discretion and caution were not observed, that is also involuntary manslaughter. But if John Aaron intended, or was endeavoring, by violence, to commit a felony on the person of the defendant, and if the defendant had killed him in self-defence, and in defence of his person, he would have been justifiable in so killing John Aaron; and if the shot was intended for him, and hit and killed Reynolds, in that case it is excusable homicide, and you should find the defendant not guilty; and if the killing was by accident, and not the result of evil design or intention, or culpable neglect, then the Law says, he shall not be found guilty of any crime; and in that case you should acquit him. There must be a felonious intent in the defendant before you can find him guilty of the crime of either murder or manslaughter; and if there was no felonious intent or evil design, or culpable neglect, there is no crime and should be no conviction. If you have a reasonable doubt of the guilt of the accused, you must give him the benefit of that doubt and acquit him; if you have any doubt as to the grade of the homicide, it is your duty likewise to give him the benefit of that doubt and find him guilty of the lowest

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grade, if you find him guilty at all. Flight is not evidence of guilt, or usually is very slight evidence of it.

The Jury returned a verdict, finding the defendant guilty of Voluntary Manslaughter.

Counsel for the defendant then moved the Court to set aside said verdict and award a new trial of said case on the following grounds, to-wit:

1. Because the verdict is contrary to evidence: contrary to the weight of evidence: and without evidence to support it.
2. Because the evidence is not sufficient to remove all reasonable doubt of the guilt of the accused.
3. Because the verdict is contrary to the Law and the charge of the Court.
4. Because the Court erred in refusing to permit the defendant's counsel to prove, by Andrew J. Watters, the sayings of the defendant, made about five minutes after the discharge of the pistol, said counsel stating that they expected to prove by the witness that the defendant had gone about one hundred and fifty yards from the place where the deceased was shot, and in about five minutes thereafter, or it might have been less or more than five minutes, sent for the witness, and upon the witness, going to him, the defendant made the declaration sought to be given in evidence, viz: that the pistol fired accidentally. Counsel for the State objected to the declaration being given in evidence, on the ground that it did not accompany the act, and was not a part of the *res gestae*. The Court excluded the declaration, and refused to let the witness testify as to the sayings of the defendant, unless they immediately accompanied his act.
5. Because the Court erred in refusing to permit the defendant's counsel to introduce evidence, showing why the defendant had the pistol on the occasion of the homicide.
6. Because, after the defendant had closed his testimony, W. W. Clark, one of the counsel for the State, handed to the presiding Judge a letter, and, at the same time, stated to the Court, in the presence and hearing of the Jury, that the letter gave him information of additional evidence in behalf of the State, and asked for time to

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send for and have such evidence before the Court; the presiding Judge, on examining the letter, remarked that the testimony, if present, would be inadmissible, and the application for time was refused.

The presiding Judge, after hearing argument, overruled the motion, and refused the new trial asked for, and the writ of error in this case is prosecuted for the purpose of reversing that decision.

BARTLETT & FLOYD, for the plaintiff in error.

HAMMOND, Solicitor General, by NAT. J. HAMMOND, CLARK & LAMAR, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

The defendant, Richard Aaron, was indicted for the murder of James H. Reynolds, and convicted of Voluntary Manslaughter.

The Court below refused to grant a new trial, and the accused brings his case to this Court by Writ of Error.

A number of persons had casually met at the store house of the deceased, and the evidence is—and such no doubt was the fact—that all the parties present were entirely friendly with each other. There was no grudge or ill-will existing between any of them. A game of marbles for a small wager was proposed and accepted, there being two on each side. John Aaron and James Reynolds played against Richard Aaron and James Aaron. During the second game, an altercation sprang up between *John* and *James Aaron*, about *cents* and *kicks*, and to prevent a fight between the brothers, Reynolds seized and carried off James Aaron, and Richard Aaron, from behind, grasped the arms of John Aaron and dragged him off. It is not pretended but that up to this time there was not the slightest manifestation of any bad feeling, except as between John and James Aaron, and that Richard Aaron and James Reynolds were acting *bona fide* the part of peace-makers.

Just at this time, John Aaron demanded of Richard Aaron to release him, or he would cut himself loose. He drew his knife from his pocket and opened it; Richard, from behind, relaxed his hold and pushed John forward up the hill, proba-

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bly to avoid immediate danger. At first, it was supposed that John intended starting toward James, with whom he had had the difficulty, but he turned suddenly toward Richard, and, with his knife drawn, and in a striking attitude, advanced upon him. Richard drew from his pocket one of Colt's repeaters—his latest patent, and a most remarkable weapon it is—still retreating down the hill, and laid it across the palm of his left hand, holding his right thumb upon the hammer; John stopped.

In the mean time, James Reynolds left James Aaron and advanced toward John Aaron, intending likely further to interpose to prevent mischief between John Aaron and Richard. The three stood in a triangular position—Reynolds being within a few feet of John Aaron; the pistol was still in the situation I have represented; it went off and the load was discharged in the breast of James Reynolds, near the collar bone. Reynolds died immediately of the wound.

It is in evidence, that the eyes of Richard and John Aaron were steadily fixed upon each other all the time; and it is quite probable that Richard had not noticed the approach of Reynolds. The trigger of this pistol, when cocked, protrudes slightly through the guard, and the grasp of the barrel—so as to prevent it from revolving—or the pressure of the lower or inner side of the left hand, as the pistol was grasped in the palm, will, in the first instance, prevent the pistol from cocking, or in the latter, if cocked, will cause a discharge.

I have not recapitulated all the testimony, nor have I grouped the facts together so favorable for the defendant, as the evidence warrants; and to convey any clear idea of the pistol upon paper, requires more scientific knowledge of gunnery or fire-arms than I possess; and yet, to understand the real merits of this case, a correct comprehension of the mechanism of this pistol is indispensably necessary.

Now, there is not a suspicion entertained by any body that the defendant intended to shoot Reynolds. The able counsel, Mr. Lamar, who represents the State, and of whose argument, I may truthfully say, I was at a loss whether to admire it most for its ingeniousness or its ingenuousness, cheerfully concedes this. Did he intend to kill John Aaron? The proof shows he did not. The pistol was not pointed in that direction. It was not held in a position for that purpose.

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It was not aimed at John Aaron. John Aaron had ceased to advance upon the accused, and was standing still when the explosion took place. It is most unreasonable to conclude that he shot intentionally at John Aaron. And then, on the other hand, it is so natural to suppose that the shooting was accidental, and any one, acquainted with this weapon, could scarcely doubt upon this subject. The pistol was likely cocked, when placed in the left hand, with the right thumb on the hammer, to prevent its going off, and it was the involuntary pressure of the lower or inner side of the left hand against the trigger, that produced the accident.

As to voluntary manslaughter, it is wholly inconsistent with the circumstances of this case, and we think the Court was wrong in charging the Jury—although it is not made a ground of complaint in the motion for a new trial—“That, if John Aaron was attempting to commit a serious personal injury upon the defendant, and the defendant, under a sudden, violent impulse of passion, had killed him; in such a case it would be voluntary manslaughter.”

If John Aaron was attempting to commit a felony upon Richard Aaron, Richard Aaron, with or without passion, must have been justifiable in killing John Aaron.

But there is not a particle of proof in the record to justify the hypothesis that Richard Aaron was actuated by any sudden, violent impulse of passion. Never was a man more cool, collected and courageous. Having drawn his pistol, and, perhaps, cocked it, he placed it in the palm of his left hand, and calmly, and apparently dispassionately, waited the result. He eyed John closely and intently all the time, to determine whether John would force upon him the necessity of taking John's life to save his own, or to protect himself from some serious bodily hurt. Never was conduct more deliberate and self-possessed. Had he been influenced by fear or passion, the demonstration would have been very different. And just when the emergency had apparently passed away, the pistol, from some casualty or other—the nature of which we shall probably never correctly understand—exploded, while still resting in his left hand.

The only crime, then, of which the defendant could possibly be guilty, was the lowest grade of manslaughter, to-wit: involuntary manslaughter in the commission or performance of a lawful act, where there has not been observed necessary discretion or caution.

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That it was lawful for Richard Aaron to defend himself at any and every hazard against the assault which was threatened by John Aaron, there can be no doubt. And for myself, I must say, in all candor, that I am at a loss to perceive how, situated as he was, any greater degree of discretion or caution could have been used than was manifested by him on this occasion.

If Richard Aaron is to be punished for his want of due care and circumspection in the perilous position in which he was placed, why should those escape who accidentally shoot each other, or their families, in handling or using fire-arms?

I believe it would be a perversion of the criminal justice of the country, to punish Richard Aaron for that as an offence which was only a misfortune, and which, I doubt not, none regretted more deeply than himself.

Our judgment, therefore, is: That a fair trial should have been granted, because the verdict was strongly and decidedly against the weight of evidence. Moreover, we think, it was error in the Court, not to allow the defendant to explain how he happened to have a pistol on that occasion. If he had been using it in aiding to arrest a felon the over-night, or were in the discharge of the duty of a patrol, or for any other lawful purpose, it was right to permit him to prove it. Here, according to the case made by the record, it could not affect the result one way or another. Had there been a probable case of murder made out, it might have become very material to make this proof.

We see no other errors in the Bill of Exceptions which require corrections by this Court.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed upon the ground, first, that the Court erred in not permitting the defendant to show why he had the pistol on the day the homicide took place; second, because the verdict was strongly and decidedly against the weight of evidence.

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The owner of property out of possession can only recover, in an action of Trespass, for an injury done to the reversion.

Trespass, in the Superior Court of Spalding county.
Tried before Judge CABANISS, at the May Term, 1860.

Mary A. Wiggins, as Executrix of William W. Wiggins, deceased, commenced an action of Trespass in Spalding Superior Court, against John P. Lovett, to recover damages for injuries alleged to have been inflicted by the defendant upon the person of a negro woman slave, by the name of Dinah, belonging to the estate of said deceased, by which said slave was injured, and her services lost to the plaintiff.

Pending the action, Mary A. Wiggins married, and Thomas C. Johnson was appointed Administrator *de bonis non* of the estate of said deceased, and made party plaintiff to said action, in lieu of the said Mary Wiggins, whose letters abated by her marriage.

On the trial of said case the following evidence was introduced. to-wit:

On or about the 15th of July, 1858, it being the Sabbath day, the defendant inflicted upon a negro woman named Dinah, belonging to the estate of William W. Wiggins, deceased, a severe whipping, with a cow-hide, and by kicking her in the abdomen, and knocking out one of her teeth, and otherwise beating and bruising said negro; that the whipping commenced in the public streets of Griffin, and was continued in the kitchen of defendant; that the defendant was aided by two other negroes, one of which defendant ordered to take hold of Dinah's feet, and the other to take hold of her head; that when defendant first commenced whipping the negro she seemed to resist, or defend herself; that the negro was seriously injured, and was confined, in consequence of it, for about two weeks, but afterwards moved about and seemed as sprightly and as well as before the whipping; that the defendant gave as an excuse for the whipping, that the negro Dinah, who at the time pursued the business of a washer-woman, had some dresses to be washed for defendant's wife and another lady at his house, and that when the dresses were sent for by another servant

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girl, she returned and reported a message from Dinah, she would not send the dresses until she had got them done and that forty devils and the defendant himself could make her send them until she got ready: that the negro Dinah was, at the time of the whipping, hired to George Johnson, and that the Physician's bill for attending during the sickness, consequent upon the whipping, about fifty dollars, and defendant had no control over negro.

During the progress of the trial counsel for the plaintiff proposed to ask William R. Phillips, one of the witnesses who testified in the case, and who saw the whipping: "What damages, in his opinion, the plaintiff sustained by the injury done to said slave, by the whipping?" This question was objected to by the defendant's counsel, and the objection was sustained by the Court, and the answer was repelled; and the plaintiff excepted.

The presiding Judge read from the Penal Code of the State, as follows: "Any person except the owner, overlord or employer of a slave, who shall beat, whip or wound a slave, or any person who shall beat, whip or wound a person of color, without sufficient cause or provocation being first given by such slave or free person of color, such person so offending may be indicted for a misdemeanor, and on conviction shall be punished by fine or imprisonment in the common Jail of the county, or both, at the discretion of the Court; and the owner of such slave, or guardian of such free person of color, may, notwithstanding such conviction, recover in a civil suit, damages for the injuries done to such slave or free person of color." Charged the Jury that the clause of the Penal Code, so read, was the law of said State. His Honor also charged the Jury: "That the measure of damages in said case was only the actual damage done to the slave, and the Physician's bill."

To the latter portion of said charge the plaintiff excepted.

The Jury returned a verdict for the defendant, with costs of suit.

Counsel for the plaintiff then moved for a new trial, on the following grounds:

1. Because the Court erred in not permitting the plaintiff's counsel to prove by the witness, Phillips, the amount of damage, in his opinion, the plaintiff sustained, by reason of the beating of said slave.

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2. Because the Court erred in charging the Jury that the measure of damages was only the actual damage done to the slave, and the Physician's bill.
3. Because the verdict of the Jury was against the weight of evidence, and without evidence, and contrary to the law of the case.
4. Because the plaintiff has discovered, since the trial of said case, that one Mrs. Thomas was present when the negro of defendant came for the dresses belonging to some of defendant's family, on the morning of the day of the beating, and that the said Mrs. Thomas heard the message sent by Dinah to defendant, and that Dinah did not send the message which was communicated to defendant, and relied on by him as a provocation for beating the slave, Dinah.

The facts set out in the last ground of the motion for a new trial were not verified by the affidavit, either of the witness or of the plaintiff, but counsel for the plaintiff stated in his place that he expected to make the proof stated in said last ground; that the witness, Mrs. Thomas, then lived in the county of Haralson, and that it was impossible to obtain her affidavit in time for the hearing of the motion for a new trial; that the plaintiff also lived in another county and was not present at the trial, and his affidavit could not be obtained in time for the hearing of the motion.

In addition to this statement of counsel, they presented the affidavit of one James Davis who states that he heard the witness, Mrs. Thomas, assert the facts contained in said last ground in said motion for a new trial.

The motion for a new trial was overruled, and this decision is the error complained of in this case.

DOYAL & BECK, for the plaintiff in error.

ALFORD, PEEPLES & CABANISS, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

This was an action of Trespass brought by the owner of a female slave, to recover damages of the defendant, for the unlawful beating of said slave. The defence was that there was sufficient provocation given to justify the whipping.

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The Jury rendered a verdict for the defendant. A new trial was asked and refused; and this is the error assigned for our revision.

The woman was employed to do the washing of the family of the defendant. The defendant alleges that she returned an insolent response by a servant, sent on Sunday morning to bring home some dresses, and for this he repaired to the neighborhood of the girl, and finding her in the street he attempted to force her into the kitchen, and upon her resisting his attempts to drag her into the house, he inflicted upon her a severe beating in the street; and after getting her within doors he continued the beating, inflicting blows and bruises upon various parts of the body and head, knocking out one tooth, &c.

The woman was confined to her bed, by reason of this abuse, for about a month, her situation requiring the services of a physician whose medical bill amounted to about fifty dollars. The Court charged the Jury that the plaintiff was entitled to recover for the actual damage done the girl, and for the Doctor's account.

A Mr. Phillips was examined as a witness on the trial, and after testifying to the facts of the beating, of which he was an eye and a ear witness, he was asked to give his opinion as to the damage the girl sustained. The question being objected to, was repelled by the Court, and this decision is excepted to as error.

Amongst other grounds taken in the motion for a new trial, was that of newly discovered evidence. Without further remark, I shall dismiss this ground by stating that it does not come up to the rule prescribed by the Court in such cases. The excuse given is, lack of time to procure the necessary affidavits; but no motion was made to postpone the rule, to enable the plaintiff to supply this acknowledged defect. I may add that the testimony, if procured, was negative in its character, and would have averted nothing.

Upon the threshold of this case we state, as a Court, that there is much to condemn in the conduct of the defendant. When insults are given personally by a slave, it is right to punish instantly; and the party offended need not delay until the owner can be consulted. The condition of our society demands this promptitude of proceeding. But in a

case like this there is no need for this hot haste; but on the contrary, altogether better to proceed more carefully and not to act without consultation with the owner or employer of the slave. It may be that in this case the information received through the servant of the defendant may not have been true. Hence, more caution and circumspection was necessary. The servant who communicated the objectionable message may have been actuated by ill-will toward the woman. It is dangerous, in this hasty way, to act upon the *ex parte* representations of another servant.

Again: we say emphatically, that, considering the day and the place upon which this violence was inflicted—on the Sabbath morning, in the public streets of the city—the conduct of the defendant was altogether unbecoming. Moreover, the punishment, itself, was both indecent and excessive, and cannot be justified, considering that the message delivered to the defendant was not misunderstood nor misrepresented. The description of this beating, both as to its extent and the mode of inflicting, is alike revolting to the feelings of decency and humanity.

But we sit here to administer the Law of this case; and to it I shall briefly address myself.

It will be remembered that this girl was hired out at the time the alleged Trespass was committed, to a Mr. George Johnson, and was not in the possession of the plaintiff in this action, who represents the estate of Wiggins, to which the girl, Dinah, belongs. The suit, then, is brought, not by the *hirer*, but the *owner*. The owner can only recover for some permanent injury done to his slave; or, as the Books express it, in speaking of a horse as any other personal property—for an injury done to the *reversion*. When the owner is in possession of personal property, he can recover for present service, physician's bill, &c.: but that is not this case.

Does the proof show there was any permanent injury done this woman? The Doctor who attended her first thought there was, from the character of the beating. He testifies, however, that he saw her afterwards, and she appeared to be going about as sprightly as ever. If the fact existed, evidence could readily have been adduced to prove it. The failure to bring forward such testimony is an admission that no lasting injury was done. We can hardly venture to con-

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sider the loss of a tooth as diminishing, either the actual or marketable value of the woman. The maxim, *de minimis* will not apply in such a case.

This being so, what foundation is left to warrant a verdict in favor of the owner? None that we can see. The defendant may still be liable to the hirer, provided the claim be not barred, for loss of service and the physician's bill or he may be made criminally responsible for the beating provided it was cruel and excessive, and without sufficient provocation. We express no opinion upon these points.

It only remains to consider whether the Court was right in ruling out, on the trial, the interrogatory propounded to the witness, Phillips. Having already stated all the facts as to the whipping, he was asked to give his opinion as to the damage done the girl? The Court has, in many cases, permitted witnesses to give their opinion in connection with the facts to which they have testified. But the question, as put without qualification, was too broad. Can any one doubt that the witness would have included in his reply the temporary injury as well as the permanent? Indeed his answer would, most likely, have been influenced, mainly, by the results; in other words, to the loss sustained by the hirer. The inquiry should have been made definite, viz: What was the permanent injury to the woman? He proved none. The form of the question, then, was objectionable, and properly ruled out by the Court. He might also have embraced in his censure many fanciful and imaginary reasons as the measure or ground of damages, not authorized by law, as the facts of the case, and yet the Jury would not have been enabled, by the generality of his answer, to have judged of the sufficiency of the witness' reasons.

The Jury were already in possession of all the witness knew about the matter—for he had been examined fully—and could more properly estimate the damages than he could.

Upon the whole, we see no ground for reversing the judgment of the Circuit Judge denying a new trial. The charge of His Honor was more favorable to the plaintiff, as owner, than he was entitled, upon the law of the case. The Jury declined acting upon it, and their finding ought not to be disturbed.

Doyal et al. vs. Doyal et al.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the judgment of the Court below be affirmed.

DOYAL et al. vs. DOYAL et al.

The husband died in 1849. His widow made application for Dower in land, of which he died seized in 1859. *Held*, that her right was barred by the Statute of Limitations.

Application for Dower, in Henry Superior Court. Tried before Judge CABANISS, at the April Term, 1860.

This case came up and was adjudicated on the following statement of facts, to-wit:

Elijah S. Boynton died in the year 1849, and John A. Smith was qualified as the executor of his Will in the same year. In his Will, Elijah S. Boynton bequeathed to his wife, during her life or widowhood, for the support of herself and four younger children, one hundred and seventy-six acres of land in the seventh district of the county of Henry, and known as the place whereon the said testator died. In May, 1855, the said widow of the testator intermarried with D. D. Doyal, and immediately thereafter, John A. Smith, executor, filed a Bill in Equity for instruction and direction as to the testator's Will, and the Hon. E. G. Cabaniss, the Judge presiding then and now, decided that the said Elijah Boynton died intestate as to said land, which decision was affirmed by the Supreme Court, and at the April Term, 1860, of Henry Superior Court, a decree was rendered affirming the said decision, or making it the Judgment of said Superior Court. At the October Term, 1859, of the said Superior Court of Henry county, the said D. D. Doyal and wife applied for

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Dower in said land, and at the April Term, 1860, under the facts aforesaid, the presiding Judge decided that the application for Dower was barred by the Statute of Limitations.

To this decision, the applicants excepted and now assign error thereon.

DOYAL, for the plaintiffs in error.

BOYNTON, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The testator having died in 1849, and the application for Dower not made until 1859, her right to Dower in the land of her husband, the deceased testator, was clearly barred by the Statute of Limitations. The Statute is imperative: "That in all cases hereafter, when any husband shall die, application for the assignment of Dower shall be made by his widow within seven years after his death, otherwise her right to Dower shall be absolutely barred." *Cobb*, 230.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be affirmed.

WILLIAMS et al. vs. WALKER et al.

Where a testator nominates two executors—one of whom only qualifies, employs an Attorney in behalf of the estate, and dies before the services are paid for, and the other executor qualifies, he is liable to be sued as such in a Court of Law for the fee.

Assumpsit, in Upson Superior Court. Decision by Judge CABANISS, at the May Term, 1860.

Henry Williams, as executor of John Macpherson Berrien, brought an Action of Assumpsit, in the Superior Court of Upson county, against Nathaniel F. Walker, as executor of Allen M. Walker, alleging in his declaration:

That on the 21st day of June, 1849, Allen M. Walker died, leaving a nuncupative Will, by which Jesse L. Owen and Nathaniel F. Walker were nominated executors; that, in the opinion of said executors, it became necessary to obtain the services of eminent counsel in the matter of setting up and proving said nuncupative Will, and having the same established, and admitted to record as the last Will and Testament of said Allen M. Walker; that, in conformity to said opinion, the said Jesse L. Owen and Nathaniel F. Walker engaged the professional services of the said John Macpherson Berrien, and then, to-wit: on the 15th of November, 1849, and afterwards on the 1st day of November, 1855, undertook and promised to pay to the said Berrien, then in life, whatever said services might be reasonably worth; that, at considerable trouble, inconvenience and expense, the said Berrien prepared an elaborate opinion in writing, touching the character, requisites and proof of nuncupative Wills under the laws of Georgia, which opinion the said Berrien forwarded to the said Jesse L. Owen, and the said opinion so prepared was, at the special instance and request of the said Jesse L. Owen and Nathaniel F. Walker, read before the Hon. John J. Floyd, who presided at the trial of the questions, as to the character, validity and sufficiency of said nuncupative Will; that said written opinion was of great importance and value in procuring a decision in favor of said nuncupative Will, which was adjudged to be the true last Will and Testament of the said Allen M. Walker, and as such was established and admitted to record in the proper Court; that the

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said Jesse L. Owen then qualified as executor of said Will, and assumed the execution of the same, and as such became liable to pay for said services, which, the plaintiff alleges, were worth the sum of five hundred dollars; that, on the 1st day of November, 1855, Jesse L. Owen died without having paid said sum or any part of it; that, since the death of said Owen, the said Nathaniel F. Walker has qualified as executor of said nuncupative Will and assumed the execution thereof, and as such is liable to pay for the said services, but refuses to pay the same or any part of it.

The defendant demurred to the declaration, and moved to non-suit the same, upon the ground: That the contract sued on having been made with Jesse L. Owen, one of the nominated executors of Allen M. Walker, who qualified as such after the Will was set up, and has since died; that the present defendant is not liable, either in his individual or representative character in said action, and that Allen M. Walker's estate is not liable.

The presiding Judge sustained the demurrer, and passed the following order:

"On motion of counsel for defendant, it is ordered by the Court, that a non-suit be and is hereby awarded, on the ground that there is no privity of contract between the plaintiff's intestate and the defendant."

The plaintiff alleges that said decision is erroneous, and asks a reversal of the same.

P. W. ALEXANDER, PEEPLES & CABANISS, for the plaintiff in error.

J. M. SMITH, by A. W. HAMMOND, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

This action was brought by the executor of the late Judge Berrien, to recover a fee for professional services rendered the estate of Allen M. Walker, deceased. Allen M. Walker nominated two executors, Jesse L. Owen and Nathaniel F. Walker. At first, Owen only qualified, and it was Owen who employed Judge Berrien. Since the services were rendered, and as to the value of which there is no dispute, Owen

has died and Nathaniel F. Walker has qualified. The action is brought against him. The Court non-suited the case upon the ground, that Nathaniel F. Walker was not bound, either personally or representatively, for this fee.

While we are clear, of course, that there is no individual liability attaching to the defendant, we entertain no doubt that the estate he represents is responsible. Were not the services rendered the estate? Why should the estate not pay for them? How is it, that in the distribution of intestates' estates fees of counsel are always ranked amongst the debts of the first dignity, and that this fee is not collectable?

Suppose Mr. Owen, in his life-time, had brought Ejectment or Trover to recover the land or negroes of the deceased. must not the estate be responsible for the fees of the Attorney? Undoubtedly; and so for any other professional service. Or, suppose the land and negroes were directed by the Will to be kept together, and worked on the plantation, would not the estate be liable for the owner's wages? (*Williams on Ex's.*, 1580. 2 Penn. Rep., *Sterritt's case*, 426. *Boyston vs. Boyston*, 29 Geo. Rep., 101.)

It is conceded that the fee could be recovered by a proceeding in Equity—why not at Common Law? Why perpetrate the folly of compelling the estate of Judge Berrien to proceed first against the estate, and thus drive the estate of Owen to go against the estate of Allen M. Walker for reimbursement? The Law justly abhors such circuitry.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed upon the ground, that the Court erred in awarding a non-suit. It is further ordered and adjudged, that the non-suit be set aside and the case re-instated.

*Doyal et al. vs. Smith et al.*DOYAL *et al.* vs. SMITH *et al.*

The 9th item of testator's Will is as follows: "At my death, I give and bequeath to my beloved wife, Elizabeth Boynton, during her life-time or widowhood, the West half of my land, with a good horse and farming tools for one horse; two cows and calves, and one year's provision for the family, and household and kitchen furniture, sufficient for the use of the family; one bed and bedstead, for the use of the four younger children; and one cart and oxen, for the use of the family; also, Solomon's labor is to go to raise the children. When the youngest becomes of age, he shall be the property of my wife, Elizabeth Boynton, and also Floyd, a negro boy, and fifty dollars, for the use of the family." The intended disposition as to Floyd being equivocal, and parol testimony being let in to show what was the intention *Held,*

1. That the verdict of the Jury must be on the parol testimony, and not upon their sense of the words of the Will.
2. When the verdict is decidedly against the weight of evidence, a new trial will be granted.

In Equity, in Henry Superior Court. Tried before Judge CABANISS, at the April Term, 1860.

John A. Smith, executor of Elijah S. Boynton, deceased, filed his Bill in Equity in Henry Superior Court, invoking a construction of the ninth item of the Will of the said Elijah S. Boynton, and asking direction as to the execution. The said ninth item of the Will is in the following words, to-wit:

"At my death, I give and bequeath to my beloved wife, Elizabeth Boynton, during her life-time or widowhood, the West half of my lands, with a good horse and farming tools for one horse; two cows and calves, and one year's provision for the family; and household and kitchen furniture, sufficient for the use of the family; one bed and bedstead, and bed furniture, for the use of the four younger children; and one cart and oxen, for the use of the family; also, Solomon's labor is to go to raise the children. When the youngest becomes of age, he shall be the property of my wife, Elizabeth Boynton; and also Floyd, a negro boy; and fifty dollars, for the use of the family."

The controversy in this case is confined to that clause of the ninth item of the Will, relative to the negro boy Floyd, in these words: "And also Floyd, a negro boy."

Elizabeth Boynton sets up in her answer to the bill: That

it was the intention of the testator in and by his said Will to give and bequeath to her, absolutely, the negro boy Floyd, mentioned in the said ninth item; and that, when the testator directed the draftsman of his said Will to dispose of the labor of Solomon for the benefit of the younger children until the youngest should become of age, and then to become the property of the respondent, the respondent remarked to testator that Solomon would be old by that time, and comparatively worthless, the said testator replied that it made no difference, as he would give to respondent the boy Floyd, absolutely and unconditionally, and make her equal with the children, and so instructed the draftsman to provide in said Will, and said draftsman assured testator that the language employed in said Will did convey a title to said negro boy to the respondent.

John A. Smith was introduced as a witness on the trial, and testified:

That he was present when the Will of Elijah Boynton was made, and at that time the testator told the draftsman of the Will to put down Solomon's labor to go to raise the four younger children, and after the youngest child became of age, Solomon to be the property of his wife Elizabeth. She being present, remarked: who would have him then! The testator then said to his wife: Betsy, I will give you the negro boy Floyd. The said Elizabeth has had possession of said boy Floyd from the testator's death until her intermarriage with D. D. Doyal, since which time the said Doyal has had possession of said negro boy; that the youngest of the older Boynton children has been of age about four years, and he, the witness, is guardian of the younger children, and has been their only guardian for four years or more.

It was also admitted by the written agreement of the counsel of the parties: That the negro boy Floyd, at the time of executing the Will, in 1849, was four or five years old, and is worth about twelve hundred dollars; and that the youngest child of testator is about twelve years old; that Elizabeth Boynton, the widow, had and kept possession of all the negroes willed to the four younger children until her marriage with D. D. Doyal, and that, afterwards, the negroes remained on the place; that John A. Smith was appointed the guardian of the four younger children, the 2d of April,

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1855, and that D. D. Doyal and Elizabeth Boynton married the 6th of May, 1855, and that the bill in this case was filed the 17th of March, 1856; and that John A. Smith has been the qualified executor of the testator, Elijah Boynton, since the probate of the Will.

The testimony being closed, the presiding Judge charged the Jury as follows, to-wit:

The question made by the bill and answer was the construction of the ninth item of the Will of the testator, in relation to the negro Floyd. It was the duty of the Court to construe the Will, and the Court had construed the clause under consideration, and held, that the same disposition was made of Floyd that was made of the negro Solomon in the same item; that the words "also Floyd" meant that Floyd was disposed of in the same manner that Solomon was; that "also" meant "likewise"—"in the same way"—"in the same manner;" that, when the item said that "the labor of Solomon was to be used for the support of the children until the youngest arrived at age, and then to belong to testator's wife," and added "also Floyd," the proper and legitimate construction was, that Floyd was disposed of likewise—in the same way—in the same manner; and the decision of the Court, giving the Will that construction, was excepted to, and the Supreme Court held that a different construction might be put upon the clause, and that parol testimony might be introduced to explain what disposition the testator intended to make of Floyd, and what interest he intended his wife to take in him. Testimony had been introduced for that purpose, and the answer of Elizabeth Doyal, when not responsive to any charge in the bill, was not evidence, and as the bill merely called for a construction of the Will, and did not make any charge as to the disposition made of Floyd, that part of the answer of Mrs. Doyal in relation to the intention of the testator to "give her Floyd," not being responsive to any charge in the bill, was not evidence. Parol testimony, as to the intention of the testator in the disposition made of Floyd, had been submitted to the Jury, and the question for them to determine was: What disposition was made of Floyd by the testator, and what interest did he intend his wife to take in him under the clause under consideration? If they believed that the proper construction of the clause before them was, that the same dis-

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It was made of Floyd that was made of Solomon, and parol testimony introduced showed that to be the intention of the testator, then they should decree that the labor of the said child should be used and appropriated for the support of the said child of the testator until the youngest should arrive at full age, and then vest in, and become the absolute property of the said child; but if they believed that such was not the proper construction of the clause according to the testimony which was introduced, and if that testimony showed the intention of the testator to be, that Floyd should be the absolute property of his wife, they should so decree; and that it was necessary that the word, absolutely, should have been used by the testator to vest the absolute right to Floyd in the said child.

On this charge of the Court, counsel for the defendants moved for a verdict.

The Jury rendered a decree, (amongst other things) that the said child of Floyd should go to raise the younger children of the said testator, Elijah Boynton, and when the youngest child should be of age, then the said Floyd to belong to Mrs. Elizabeth Doyal absolutely.

Counsel for the said D. D. Doyal and wife then moved for a new trial of said case on the following grounds, to-wit:

because the said charge of the Court was erroneous.

because the verdict of the Jury was contrary to Law.

because the verdict of the Jury was contrary to evidence.

The presiding Judge overruled the motion and refused the new trial, and that decision constitutes the error complained of in this case.

AL, for the plaintiffs in error.

NOTON, for the defendants in error.

The Court.—LYON, J., delivering the opinion.

In this case was before this Court on a former occasion *Geo. Rep.*, 262—it was held that the clause of the will as to Floyd, may be read two ways: either as an absolute gift to the wife, to take effect immediately, or as a devise similar to that made of Solomon. The meaning of the will as to this negro, is, in the language of the books,

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"equivocal," and parol testimony was allowed for the purpose of ascertaining which construction was intended by the testator—not from what was written in the Will, for upon that the Court was to pass, and not the Jury—but from what was said by the testator at the time of the execution of the Will, to be proven by the witness.

From the manner in which the Court submitted the question to the Jury, with his argument in support of his construction as being the true one, the Jury may have felt and probably did feel, that it was their duty to construe the Will from the words of the Will rather than from the testimony of the witness, and that the views presented by the Court in the charge were the correct ones. We think this was error.

2. But, we think, this judgment must be reversed, on another and more conclusive ground, and that is: That the verdict is contrary to the evidence. The testimony of the witness Smith is, that the testator, at that point in the Will, and while it was being written, in which Solomon is disposed of, said: "Betsy," addressing his wife, "I will give you Floyd." If this clause had been inserted in the Will: "I, also, give Floyd to my wife"—and that is the sense of what testator did say—would there have been any doubt as to what disposition the testator meant to make of Floyd? We think not.

This testimony is very satisfactory, that the testator meant that his wife should take an absolute gift in the negro Floyd, and as the verdict was against that conclusion, a new trial must be had.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in refusing to grant a new trial on the ground that the verdict was contrary to evidence.:

Thrash vs. Hardy.

THRASH vs. HARDY.

The 5th and 6th items of Testator's Will are: 5th, "I give to my son-in-law, John Thrash, the sum of five dollars, and *no more*, of my estate, both real and personal, for his full share." 6th, "I Will that my beloved daughter, Mary R. Thrash, that she shall keep the negroes she has now in her possession, *for her only use*, and for the use of the lawful heirs of her body during life." *Held*, That whatever interest the wife did take in the negroes under these clauses, was to her separate use, and to the exclusion of the husband, and that she was entitled, in an action of Trover, to recover against one holding the property (vested by the Will) under the husband, to the extent of that interest.

Trover, in Troup Superior Court. Decision by Judge BULL, at the May Term, 1860.

This was an action brought by Mary B. Thrash, against James Hardy, to recover damages for an alleged conversion of a negro man slave by the name of Sam, of black complexion, and about thirty years old.

Upon the trial in the Court below, it appeared from the evidence, that Mary B. Thrash was the daughter of Peter Strozier, and intermarried with John Thrash in the year 1823 or 1824; that upon such intermarriage the said Peter Strozier delivered to the said Thrash and his wife several negroes, to-wit: Sam and Olivia, or Olly, and her children, to keep until he, the said Strozier, should otherwise dispose of them; and that the delivery of the negroes was only a loan, the title being retained by said Strozier; that the negroes were accepted by said John Thrash and his wife upon these terms; that the said John Thrash often spoke of said negroes, to different persons, as belonging to his wife and not to him, and that he wanted to sell them if practicable, but complained that the negroes were given in such a way as to allow him no control over them; that these declarations were made whilst Thrash was in possession of the negroes; that the negro boy, Sam, was worth from eleven to thirteen hundred dollars, and worth for hire, from 1840 to 1850, an average of seventy-five dollars per annum, and since 1850, an average of one hundred and twenty-five dollars per annum; that John Thrash sold said negro, Sam, to Thomas Hardy, and the defendant had been in possession of

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the negro for about five years, claiming him as his own, and exercising the usual acts of ownership of masters over their slaves.

The fifth and sixth items of the Will of Peter Strozier. (which was read in evidence) are in the following words, to-wit:

"Fifthly—I give and bequeath to my son-in-law, John Thrash, the sum of five dollars, and no more, of my estate, both real and personal, for his full share.

"Sixthly—I Will that my beloved daughter, Mary B. Strozier, now Mary B. Thrash, that she shall keep the negroes she has now in possession, for her only use, and for the use of the lawful heirs of her body, during life."

The evidence also showed that the testator, Peter Strozier, died in 1840, leaving his Will in force, which was proven and executed according to its provisions.

During the progress of the trial the defendant proposed to prove "the value of the negro in dispute, for and during the life-time of the plaintiff;" which testimony was objected to by counsel for plaintiff, on the ground that the measure of damages was the value of the property, with hire, and that the plaintiff was entitled to recover the corpus of the property.

The objection was overruled and the testimony admitted, to which the plaintiff excepted.

Upon this state of facts, the presiding Judge passed the following order in said case, to-wit:

"On motion, and after argument had, It is ordered by the Court that a non-suit be granted, on the grounds that the bequest to Mary B. Thrash does not create in her a separate estate, because the words are not sufficient to create a separate estate, to the exclusion of marital rights; and because the lawful heirs of her body (children) take a use with the mother, which excludes the conclusion that the wife was the separate object of the testator's bequest. Ordered that plaintiff pay the cost, the Court being of the opinion that if she takes at all, she takes jointly with the children."

These decisions constitute the errors complained of in this case.

E. Y. HILL & SON, M. H. HILL, B. H. BIGHAM, for the plaintiff in error.

B. H. HILL, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

There is one question in this case that has not been made or argued, and it is too important for us to pass upon until it is both made and argued, and that is, conceding that the interest which Mrs. Thrash, the plaintiff, did take under the 6th item of her father's Will, was for her separate use, and to the exclusion of her husband, what was that interest? Was it a life-estate in the negroes—the whole title, or a joint interest with her children? This is a very important inquiry, and a very necessary one, for a proper settlement of this case.

The 5th and 6th items are: "5th. I give and bequeath unto my son-in-law, John Thrash, the sum of five dollars, and *no more*, of my estate, both real and personal, for his full share.

"6th. I Will that my beloved daughter, Mary B. Strozier, now Mary B. Thrash, that she shall keep the negroes she has now in possession *for her only use*, and for the use of the lawful heirs of her body, during life."

Now, whether Mrs. Thrash took a life-estate in these negroes for life, with remainder to the heirs of her body, and consequently the whole title, or whether she took an interest in the negroes in common, or jointly with her children, she did certainly take some interest—whether to be enjoyed as a whole or jointly with others—the terms of the Will vested that interest to her separate use, and to the exclusion of the husband. It is to her *only use*. How much stronger could the terms, "to her sole and separate use," have been? How ~~the~~ more restrictive? We cannot see. But the Will goes farther, and gives specially to the husband five dollars, and declares that he shall have *no more* of the estate, both real and personal. Now, if he takes the wife's share of the estate under the Will, the express provision of the Will is defeated. The estate given to her, then, being to her separate use and to the exclusion of her husband, she was entitled to recover from the defendant in this action, to the extent only of that interest, whether great or small—and the non-suit ought not to have been granted.

O'Halloran vs. the State of Georgia.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be reversed, upon the ground that the Court erred in awarding a non-suit.

O'HALLORAN vs. THE STATE OF GEORGIA.

1. The name given to it, in the Bill of Indictment, does not characterize the offence; the disruption characterizes it.
2. It is neither legally or morally wrong for persons to combine to detect an offence.
3. The furnishing of liquor to slaves is a crime which, in its consequences, is one of the most mischievous in the Code.

Indictment for a Misdemeanor, in Meriwether Superior Court. Tried before Judge BULL, at the February Term 1860.

At the August Term, 1859, of the Superior Court of Meriwether county, a Bill of Indictment was found against William O'Halloran, in which the Grand Jury, "In the name and behalf of the citizens of Georgia, charge and accuse William O'Halloran, of the county and State aforesaid, with the offence of a Misdemeanor: For that the said William O'Halloran, in said county, on the twenty-sixth day of July in the year one thousand eight hundred and fifty-nine, being then and there a shop-keeper, did furnish and sell to a negro man slave, named Sam, said slave then and there being the property of one Martin Gates, a certain quantity, to-wit one pint of brandy, whisky, and other spirituous liquors, for his, the said slave's, own use, without the knowledge or consent of the owner, overseer or employer, he, the said William O'Halloran, not then and there being the owner, overseer or employer of said slave, Sam, and not then and there havin

said slave under his care, contrary to the laws of said State, the good order, peace and dignity thereof."

When the case came up for trial, and before the same was submitted to the Jury, counsel for the defendant moved to quash the indictment on the ground, that the offence charged was not denominated a Misdemeanor, and was not an indictment authorized by the Statute.

The presiding Judge overruled the motion and counsel for defendant excepted.

The evidence submitted to the Jury on the trial of said case, showed: That O'Halloran was the keeper of a liquor shop, at the White Sulphur Springs, in Meriwether county, Georgia; that the prosecutor and the other witnesses, suspecting that something was wrong about the said shop, went, on the night of the 26th of July, 1859, for the purpose of detecting such wrong, if any; that the said witness took a position near the shop, so as to see everything that was going on in and about the shop; that there were three large lamps hanging in the passage or piazza of the shop, and some two or three inside, which made it light as day; that a negro man came to the shop and passed up and down the piazza several times, and then would go off in the direction of the hotel, and then return to the shop; the negro did this five or six times, there being several persons passing in and out of the shop; that, after every one had left the shop but the defendant, the negro went into the house, and then came out of the door, when the defendant handed him a bottle, and the negro started off, and when about sixty or seventy yards off, one of the witnesses hailed and stopped the negro, took the bottle from him, and found it to contain whisky; in the early part of the same night, the negro had an empty bottle; that it was after ten o'clock at night when the defendant gave the negro the bottle; that Martin Gates has a stout, dark colored negro man, called Sam.

After the testimony and argument had closed, the Court charged the Jury as follows:

The Law does not require positive testimony in any case; that circumstantial evidence is sometimes as satisfactory as that of a positive character; all that the Law requires is. That the Jury shall be satisfied beyond a reasonable doubt. I will illustrate my idea: Suppose that your smoke-house is robbed, and a man is seen loitering about the smoke-house—

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that would be a circumstance, though slight, indicating his guilt. But, if he is afterwards seen going off from the smoke-house with a ham of meat, that additional circumstance would increase the presumption that he stole your meat, and was guilty of that offence. There is nothing morally or legally wrong, if a man suspects that a crime is about to be committed, to lay a plot and conspire with others to detect the perpetrator. The fact that the prosecutor or witnesses watched and waylaid for the purpose of detecting a supposed crime, has nothing to do with the question of the guilt or innocence of the accused.

This charge, and the decision, refusing to quash the indictment, as before stated, constitute the errors complained of.

DOUGHERTY, represented by B. H. HILL, for the plaintiff in error.

COOPER, Solicitor General, represented by L. J. GLENN, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Counsel for the defendant moved to quash the indictment, because it did not call the offence a Misdemeanor. Singularly enough, this objection is unfounded in point of fact, if the copy of the indictment in the transcript of the record be correct, as we doubt not it is.

But, whether this be so or not, this Court—in *Camp vs. the State* (3 *Kelly R.*, 417)—held, that such omission was an immaterial defect; that it is the description that characterizes the offence, and not the name given to it in the bill. Counsel overlooked this decision, no doubt, so directly in point in this case. Perhaps the adjudications of this Court (not the *obita dicta* of individual members) will be more carefully studied when it is announced that, under its present organization, one of its own decisions is not only the highest, but the only authority that is needed upon any question, and that it is a useless consumption of time, either to go back of the decision to sustain it by reported cases, or to combat it, with a view to have it reconsidered and reversed. Like the Laws of the Medes and Persians, what is written in the books of our Reports will remain written, unless re-

pealed, altered or modified by the Legislature. The titles to property—to say nothing of liberty and life—are too sacred to depend upon the fluctuating opinions of a Court, which are liable to be changed by the accession of any new member to the Bench.

As to the other point, which counsel, who argued the case, informed us he was told by his absent Brother, was in the record, we, like him, have searched diligently, but are unable to find it.

The Court charged the Jury that the guilt of the defendant might be made out by circumstantial as well as positive proof. All that the Law required was, that they should be convinced, beyond a reasonable doubt, of the guilt of the accused. His Honor gave an illustration of circumstantial evidence, and finally instructed the Jury that there was nothing, legally or morally, wrong for persons to lay a trap, or conspire with others, to detect a culprit; that that has nothing to do with the guilt or innocence of the accused—to all of which we heartily subscribe. The fact that a plan was laid to catch the offender, may warrant the Jury in scrutinizing the testimony a little more carefully, we do not deny; and there was nothing in the charge to contravene this idea. Indeed, the guilt of the defendant is too manifest to talk about the proof.

And, he has been convicted of an offence which is more destructive to our slave population; and, therefore, to the rights of property, than any in the Penal Code. It has been asserted, upon reliable statistics, that the number of negroes destroyed by liquor every year, in this State, will average one to each county; and generally they are the most valuable slaves—male and female—in the community. And the mischief, enormous as it is, stops not here. The lives and property of their owners are frequently jeopardized in this way. A bottle was found upon the person of the driver of the Winn family, who were so massacred and mangled upon the Macon & Western Railroad by attempting to cross ahead of the train, while running at full speed. I simply mention the fact, without intending to impute blame to the driver. But how often—at night especially—in our cities and towns, is the safety of families put in peril by drunken drivers? And even this is not all. Should the scenes of St. Domingo be ever re-enacted in our midst, it will be found that liquor

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has much to do with it. It engenders recklessness, nerves the arm of the timid and hesitating to deeds of desperate daring and death.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be affirmed.

VANZANT, JONES & CO. vs. ARNOLD, HAMILTON & JOHNSON *et al.*

1. When a case has been withdrawn or dismissed, without a finding by Jury on the facts on which the defence rests, and the Court below adjudge it to be reinstated, this Court will not interfere with that discretion.
2. Defendants negotiated notes with the following endorsement on the back: "For value received we assign the within notes to A., J. & H., and D. & Co., waiving demand and notice, and guarantee the payment the same." *Held*, that the defendants are liable on said notes as indorsers.
3. When the plaintiffs resided in New York, the makers of certain notes in the State of Georgia, and the notes were indorsed by defendants, to an agent of the plaintiffs, in the State of Tennessee. *Held*, that the contract was performed in the State of Georgia, and the contract, as to its nature, valid construction and obligation, was to be governed by the laws of Georgia and not of Tennessee.
4. Does the remedy given by the Act of 26th December, 1826, to sureties indorsers to compel suit on notes (by giving notice,) to be brought within three months, or they be discharged, affect the contract, or go only to the remedy? Query.

Motion to reinstate a case, in Fannin Superior Court, Decision by Judge RICE, at the May Term, 1860.

The record in this case exhibits the following state of facts, to-wit:

Davis & Campbell made two notes, dated the 18th

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August, 1856, due six months after date, payable to the order of Vanzant & Jamerson, for \$447 25 each.

On the 20th of October, 1856, Vanzant, Jones & Co. indorsed both of said notes in the following form: "For valued received, we assign the within notes to Arnold, Johnson & Hamilton, and to H. E. Diblee & Co., waiving demand and notice, and guarantee the payment of the same."

Arnold, Hamilton & Johnson, and H. E. Diblee & Co., instituted an action in Fannin Superior Court, against Vanzant, Jones & Co., to recover the sum due on the notes, the payment of which they had undertaken by said indorsement.

On the trial of the case, the plaintiffs introduced in evidence the notes sued on, with the indorsements thereon, and closed.

The defendants then proved that Davis & Campbell, the makers of the notes, and Vanzant, Jones & Co., the endorser, and defendants, all resided in the State of Georgia, and that the plaintiffs resided in New York; that the endorsements were made and delivered to the plaintiffs' agent in the State of Tennessee, and that Vanzant, Jones & Co. notified the said agent to sue Davis & Campbell, the makers, which was not done until after three months from the date of such notice.

Upon this state of facts, the presiding Judge held that the notice to sue was a valid defence for the indorsers, without showing any law of Tennessee making such notice a defence against such indorsement, and gave the plaintiff leave to dismiss said case, with leave to move to reinstate said case in the event the Court should be of the opinion that the notice to sue was not a good defence.

The presiding Judge then passed the following order, to-wit:

"It is therefore ordered by the Court, that said cause be dismissed, and that the defendants show cause at the next term of this Court, why said cause should not be reinstated, on the ground that the Court erred in holding said notice to sue to be a good defence in said case."

Upon hearing argument upon this rule, the presiding Judge, at the May Term, 1860, passed the following order, to-wit:

"Upon hearing this rule, it is ordered by the Court that said non-suit be set aside, and said case be reinstated."

The decision of the Court, reinstating said case, constitutes the error complained of in this case.

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WM. PHILLIPS, REID & WEIL, for the the plaintiffs i
error.

MARTIN, represented by EZZARD, for the defendants i
error.

By the Court.—LYON, J., delivering the opinion.

1. As the case had gone off from the docket in the Court below, without a finding, by the Jury, of the facts on which the defence rested, we do not think there was any error in the Court's allowing the case to be reinstated—and as this is the whole of the judgment complained of, the judgment must be affirmed for that reason.

But as the merits of the defence have been argued as admitted facts, we have felt it to be our duty to pass upon the several questions made in the argument, and necessarily involved in the case.

It is insisted, first, by the counsel for plaintiffs in the Court below, that the contract of the defendants is not that of an indorsement; and, secondly, if an indorsement, that as it was made in Tennessee, the Act of 26th December, 1826 (*Cobb*, 595) does not affect it; that it is a contract made in the State of Tennessee, and not to be governed by the provisions of that Act.

2. We think the defendants are indorsers. Their written engagement on the back of the note has the legal effect of an indorsement in Georgia, of notes not payable or intended for negotiation in Banks. That they stipulate therein to guarantee the payment of the note, does not the less make them indorsers, under the Act of 1826, already referred to, for by it they have the right to define their liability; and thus may be guarantors, and yet indorsers, within the meaning and provisions of that Act.

3. The next inquiry is, whether the defendants, as indorsers, are entitled to the benefit and protection of the provisions of that Act, the indorsement having been made in Tennessee? We think they can, upon the facts of this case. The makers of the notes and the indorsers all resided, at the time, in the State of Georgia, and that fact was known and understood at the making of the contract; and the defendants were only there for the purpose of effecting the

negotiations, and as a matter, perhaps, purely of convenience, where the plaintiffs' agent for collection happened to be at the time. The contract was not to be performed there, but where all the parties, that is, the makers and indorsers, resided—in the State of Georgia—the plaintiffs and indorsers residing in the State of New York. In such cases, that is, when the contract is made in one place, and to be performed in another, it is a well settled rule, that the contract, in conformity to the presumed intention of the parties, as to its validity, nature, obligation and interpretation, is to be governed by the Law of the place of performance. *Story's Conflict of Law*, § 280. 2 *Kent Com.*, 459.

4. We are very strongly inclined to the opinion that the defence set up to this action by the defendants, under the Act of 1826, does not affect, either the nature, obligation, construction or validity of the contract, but goes only to the remedy; and if that be true, and we, as I have stated, are inclined to think that it is, then the defence is good, no matter where the contract is made or to be performed; and we do not at once so decide the question, because it is not necessary to the disposition of this case.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

*Rachels & Wife et al. vs. Wimbish.***RACHELS & WIFE et al. vs. WIMBISH.**

Testator, by his Will, gave to his wife, for life, the plantation whereon he lived, and a tract of land adjoining, and fifty negroes, to be selected by her from all his negroes: provisions enough for one year's support; a sufficient number of mules, horses, hogs, cattle, wagons, household and kitchen furniture, necessary to keep up said farm; and after her death to be divided between his daughter and her children. All the balance of his estate of lands, negroes money choses-in-action, and every thing else left after the payment of debts, legacies and provisions made for his wife, he gave to his daughter for life, and at her death to be equally divided among her children. The executor kept up the farm and business of testator, in the condition in which he left it, for the year after testator's death. On a bill filed by the executor for instruction as to disposition of the income of that year, there being debts. *Held,*

1. That the bequest to the widow was specific, and that the widow was entitled to that part of the income which grew out of the employment of her part of the estate, under the Will, in its production from the death of testator.
2. That the daughter, under the residuary clause, was entitled to the clear residuum after the payment of debts and legacies from the estate, as left by the testator, and the income on such residuum from the death of the testator.

In Equity, in Troup Superior Court. Decision by Judge BULL, at the May Term, 1860.

On the 18th of December, 1858, Nathan Truitt made and published his Will, and in a short time after the execution of the Will, the testator died, leaving the same in force.

The first item of the Will gives direction as to the testator's burial.

The second item directs that all the just debts of the testator be paid, as soon after his death as circumstances will permit, with a request that his executors use such discretion in so doing as will be best for the interest of the estate.

The third item provides for the comfort and support of some old and faithful slaves of the testator.

The fourth item is in these words: "I give and bequeath to my beloved wife, Elizabeth Truitt, the place and plantation where I now live, known as the Fannin place, and a small tract of land, bought by me from Samuel Akers, adjoining it, together with fifty negroes, to be selected by her from my negroes; also provisions sufficient for one year's support: a sufficient

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number of mules, horses, hogs, cattle, tools, wagons, household and kitchen furniture, necessary to keep up said farm, which said plantation, tract of land, negroes and other property, I give and bequeath to my said wife, for and during her natural life; and after her death, I direct that after the payment of one thousand dollars out of it, to my nephew, James Truitt, the balance and remainder of it shall be equally divided between my daughter, Elizabeth Willis, and her children, the thousand dollars to be paid, after the death of my wife, to the said James Truitt, as soon as it can be done without injury to the balance of said property thus given to my wife as aforesaid, and which said thousand dollars, to be paid as aforesaid, I give and bequeath to my said nephew, James Truitt, absolutely."

The fifth item is in these words: "All the balance and remainder of my property, of every description, lands, negroes, money, choses-in-action, accounts and everything else, left after the payment of debts and legacies above specified, and the provisions made for my wife, I give and bequeath to my said daughter, Elizabeth Willis, for and during her natural life, free from the debts, contracts and liabilities of any husband she may have; and after her death, I direct that said property, together with the natural increase thereof, shall be equally divided among the children of the said Elizabeth Willis, share and share alike."

The last item nominates William D. Alexander and Hezekiah Wimbish, executors of the said Will.

The Will was duly proved and recorded, and Hezekiah Wimbish, alone, qualified as executor thereof, and assumed the execution of the same.

In executing said Will, under the direction given him therein, the executor proceeded to collect the debts due to the estate, and sell the perishable property, and a tract of land in Meriwether county, in order to pay off the debts against the estate, and the pecuniary legacies given by the Will: and finding them insufficient for that purpose, he obtained an order of the Court of Ordinary, granting him leave to sell twenty-four negroes of said estate, to raise funds to pay off said debts and specific legacies. The executor also kept all the property of the testator together, as it was left at his decease, and worked it the first year after the testator's death, the gross income and profits of which amounted to about the sum of ten thousand dollars.

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Before the day appointed for the sale of the negroes, the executor was advised that, by the terms of the Will, he could not sell said negroes for the purpose of paying the debts of said estate and the specific legacies, unless the crops, income and profits of the estate, made during the first year after the testator's death, were insufficient for that purpose.

On the other hand, the tenant for life of the residuum of said estate, under the Will, insisted that the debts and specific legacies must be paid out of the corpus of the estate, and that such life tenant was entitled to the income and profits of the residuum, from the death of the testator.

Mrs. Elizabeth Truitt also insisted that she was entitled to the income and profits of the property bequeathed to her, from the time of the testator's death.

Under these circumstances and conflict of claims, the executor filed his bill in Equity asking instruction as to the construction of said Will, and as to what disposition he should make of the crops, profits and income of the estate, and whether he should pay it over to the said Elizabeth Truitt and Elizabeth Willis, the life tenants, or whether he should apply the same to the extinguishment of the debts against the estate and the specific legacies given by the Will.

Mrs. Elizabeth Willis intermarried with Milton H. Rachels, and a guardian *ad litem* was appointed to represent the children of Mrs. Willis, who are the remainder men, of the residuum after her death.

The Court below decided that the income of the estate, kept together and worked by the executor during the first twelve months after the testator's death, forms a part of the assets of said estate in his hands, and is primarily liable for the payment of the debts against the estate, and the specific legacies bequeathed by the Will, and directed a decree accordingly.

This decision is the error complained of in this case, and a reversal of which is now asked.

B. H. HILL, for the plaintiff in error.

H. O. STANLEY & G. A. BULL, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The matters in controversy grew out of a construction of the Will of Nathan Truitt, who died in possession of a considerable estate, consisting of lands, one hundred and fifty negroes, and other personal property, all of which he disposed of by his Will. To his wife, Mrs. Elizabeth Truitt, he gave, for life, a tract of land, and fifty negroes to be selected by herself from his whole stock; provisions enough for one year's support; a sufficient number of mules, horses, hogs, cattle, wagons, household and kitchen furniture, necessary to keep up said farm, and after her death—and the payment of \$1,000 out of the same to his nephew—to be divided between his daughter, Mrs. Elizabeth Willis, and her children. All the balance of his estate, of lands, negroes, money, choses in action, accounts, and every thing else left after the payment of debts, legacies and provisions made for his wife, he gave to his daughter, Mrs. Willis, for life, and at her death to be equally divided between her children.

The executor kept up the farm, after his death, for the year 1859, in the condition in which it was left by the testator, and realized from its use or profits of that year, some \$10,000; and feeling himself empowered as to the disposition of such profits, filed this bill for instructions.

The question made by it for our determination is, whether the income, arising from the employment of the property after the death of the testator, shall be applied to the payment of debts and legacies, for which it is necessary, to prevent a sale of some of the negroes, and to that extent increasing the corpus of the residuum, or shall it be paid to the life tenants in proportion to their respective interest in the estate under the Will?

1. As to that of the widow, Mrs. Truitt, we think it very clear that the interest she takes under the Will is very specific, that is, that the life estate in the fifty negroes, and land and personal property, is a specific legacy; for the land, negroes and other personal property were to be taken in the form in which it was left by the testator.

It is well settled that a specific legacy, with its increase and emoluments, is specifically appropriated by the operation of the Will for the benefit of the legatee, from the death of the testator, so that interest is computed in them from the death of testator. Whatever interest accrues on them from the death of testator, as interest, rent, hire, or any other

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form of profit, belongs to the legatee. *Rob. vs. Leg.* 188. *Sleeck vs. Thorington*, 2 Ves Sr. 563. *Barrington vs. Tristram*. 6 Ves 345. *Apries vs. Apries*. 1 Ves. & Bea. 364. *Graybill vs. Warren*. 4 Geo., 437.

It follows, therefore, that Mrs. Truitt is entitled to such of the net income, since the death of testator, as will be in the proportion that her part of the property bears to all that was employed in its production. If the Law left us in doubt as to her interest in the profits under the Will, which it does not, the Will, itself, would place the matter beyond all controversy. The Will gives to her the land on which testator was living at his death, with negroes, stock, provisions and tools of every kind for farming purposes, indicating a plain intention of enjoyment, without change. Why all this preparation and provision for carrying on a farm, of articles, too, that cannot well be held over without loss or destruction, if not for present use? And why should this bequest, in this form, be separated from the bulk of his estate for an independent farm and for his widow, if not for her immediate benefit, and that she should take its profits? It is argued that the testator could not have intended that she should take the profits of the first year, because the Will otherwise made ample provisions for that year. The Will certainly did set apart provisions for the first year for carrying on the farm, but if the testator did not intend that she should have the income or products of the farm for the first year, from what source is she to get a support for the second year? for there is no other provision than this made by the Will. According to this argument the widow must be unprovided for, one year or the other. The testator did not intend this.

2. The main question is, that as to the residuary gift in favor of the daughter, Mrs. Willis, whether she is entitled to the profits or interests on the residuum from the death of the testator or after the expiration of a year? This question has been decided by the English Courts, both ways, under different circumstances; but it may be remarked, without going over all the cases in which these Courts have been in conflict, the residuary clauses of the different Wills under construction contained directions to the executor to convert and invest the funds covered by such clauses, and in that, all the cases referred to, from the English Courts, differ from this. Nevertheless, *Robertson on Legacies*, 2 Vol. 234, deduces

from a consideration of all these cases the following preamble, as the settled doctrine of these Courts now on this subject:

"When a residue of personal estate is given *generally* to one for life, with remainder over, and no mention is made by the testator respecting the interest, nor any intention to the contrary, to be collected from the Will, the rule appears to be now settled by the recent cases, that the person taking for life is entitled to interest from the death of the testator, on such part of the residue bearing interest as is not necessary to be applied for the payment of debts. And it seems immaterial whether the residue is only given generally or directed to be laid out with all convenient speed in funds or securities, or to be laid out in lands; and so also *Fearns vs. Young*. 9 Ves. 549. *Augustein vs. Martin*. 1 Turn. R. 232. *Hewitt vs. Morris*. 1 Turn. & Rep. 241. 2 Jar. on Will, 545, after reviewing those cases, and all others on that subject, and stating the different rules by which the Courts were governed in them, says: "It remains to be considered how far the preceding rules apply to cases in which the residuary clause contains no express trust for conversion, as when a testator too simply bequeaths all the residue of his personal estate in trust for A. for life, and after his decease, for B. absolutely. In such cases, of course, there can be no question that as to the property, which, at the testator's death, is invested upon permanent government, or even real securities, the legatee for life is entitled to the actual income, i. e. the dividends or interest from the period of the testator's death." Also, *Mills vs. Mills*. 7 Sim. 501. *Howe vs. Earl, of Dartmouth*. 7 Ves. 137.

The identical question involved in this consideration came up in *Williamson vs. Williamson*. 6 Paige Ch. R. 300, wherein Ch. Walworth, after a most careful investigation of the English cases, on this question, states the result to be: "That in a bequest of a life estate in a residuary fund, and when no time is prescribed in the Will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the time of the death of the testator." In that case, as in this, the testator, after various legacies, gave the use of the residue of his personal estate to his wife for

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life, and after her death to her three sons. The Surrogate decided that the widow or life tenant was entitled to interest on the gross residue without making deduction for unpaid pecuniary legacies, from the death of testator. The Chancellor says: "But although the Surrogate's decision was correct, as to the widow's right to the interest or income of the residuary estate from the death of the testator, the principle upon which such interest is computed is altogether erroneous. It was not the intention of the testator to give his wife the interest or income of his whole personal estate, until the debts and legacies should be paid, or for the term of one year, and then the interest on the residuary estate after that time. But it was his intention to give her the use or income of the same residuary fund, the capital of which was to be distributed to his three sons upon her death or intermarriage. The case of *Covenhover vs. Shuler*, 2 Paige 132, and the authorities there referred to, settle the principle that when there is a general bequest of a residue of the testator's personal estate for life, with a remainder over after the death of the first taker, the whole residuary fund is to be invested for the benefit of the remainder-men, and the tenant for life is only entitled to the interest or income of that fund. And to ascertain the amount of such residuary fund, so as to apportion the capital and income properly between the remainder-men and the tenant for life, the executor, upon settling the estate at the end of the year, must estimate the whole estate at what is then ascertained to have been its cash value, at the testator's death, after paying all debts, legacies and expenses of administration and other proper charges and commissions." Upon these authorities we hold that the life tenant, Mrs. Willis, is entitled to the income on the clear residuum, after deducting from the surplus of the estate a sufficiency for payment of debts and legacies, that is, that the debts and legacies be paid from the estate left by testator, and the income arising from the balance that shall be left, be paid to the life tenant from the death of testator; to illustrate: After taking out the widow's share of the negroes there will be left one hundred; from these take a sufficiency to pay the debts and legacies; what is left is the residuum, and the income produced by them since the death of testator belongs to the daughter. We mention these members and this class of property by way of exam-

ple only. Of course, if there are more or less, or other property, the rule is the same.

This strikes us as being a more sensible and reasonable rule than any other that has been suggested. Indeed, we have not been able to see a case, directly in point, that is in conflict with what we have prescribed. In all those cases where the Courts held that the income or interest was not payable to the life tenant until after the expiration of a year, and which have been overruled by subsequent adjudications, were cases where the executor was required by the Will to convert the funds into the securities from which the interest or income was to be derived. The year given in these cases was supposed, by the Court, to be a reasonable time within which the trustee could make the conversion. Here, then, is no conversion to be made—the property which the life tenant is to have the use of for life are the same negroes, the same lands, &c.; and at the death of the life tenant the same property, specifically, is to be divided among the remaindermen. Hence, the reason as well as the necessity of the rule ceases. Any other rule in this case would be unequal and unjust. It is said that Mrs. Willis, the daughter in this case, is independent of the income arising from this property for support, and, therefore, there is no necessity for the enforcement of the rule. That may be true, and we suppose is, but that is no reason why she should not have what the Will gives her. We are laying down a rule that must prevail in all other cases as well as this, and, therefore, must be general. A different ruling would exclude the daughter or life tenant from all participation in the benefit of the estate for the year, that, in some cases, might produce real want and distress. Here, the daughter who takes the life interest is the only child of the testator, and this is all the present, and possibly all future benefit she takes under her father's Will, out of his large estate; and the same rule and reasons that would take the whole income for one year, to pay debts, would take it for any year so long as the debts were unpaid, and before they were paid the life tenant might die, and thus the daughter would be actually deprived of all benefit under the Will, and the whole estate go to grand-children, one degree farther removed from testator. Such could not be the intention of the testator; and yet, so it might work out if a different rule was prescribed to that we have laid down.

Rachels & Wife et al. vs. Wimbley.

The intention of the testator was that the grand-child should take that estate of which the mother should have income and use, from his death, during her life; and can only be ascertained by taking the debts and legacies of what he left, not its profits.

Counsel for the interests in remainder have referred to Statutes, prescribing the duties of administrator in the administration of intestates' estates for payment of debts, as furnishing a rule for the executors in this case in relation to the application of this income. There is no analogy between the cases, for in cases of intestacies the Statute prescribes the rule of discounts, and the persons standing to the deceased take the whole estate. These rules enable the heir to take the whole corpus, or as nearly so as circumstances will permit. But in this case, the Will, instead of the Law, prescribes the rule of discounts. One person takes a life estate and others the remainder, and, of course, a rule that would operate wisely and beneficially for all persons entitled to the estate in the one case, would be destructive to one class of beneficiary in the other, and beneficial only to the remainder-men. In the latter case, rule of administration must be such an one as will operate on all equally.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be reversed, upon ground that the Court erred in directing the executor to appropriate the whole of the income of the first year to the payment of debts and pecuniary legacies.

The Court should have directed the payment of the debts and legacies from the corpus of the estate, and that the executor pay over to Mrs. Elizabeth Truitt, the widow of the testator, and to Milton H. Rachel and his wife, Elizabeth, the income, growing out of the use of the clear residuum after payment of debts and legacies from the death of the testator in the same proportion with their respective interests in such residuum according to Will of testator.

STANDRIDGE vs. STANDRIDGE.

1. Where a citizen of this State files a Libel for Divorce against a non-resident defendant, service may be made by publication; and if the defendant appears by Attorney, and without pleading to the jurisdiction of the Court, files a plea of the general issue, and a special plea to the merits, the jurisdiction of the Court is complete, and the Judgment will be valid and binding to all intents and purposes whatsoever.
2. The grounds of divorce are regulated by the *lex fori*.

Libel for Divorce, in Towns Superior Court. Tried before Judge RICE, at the May Term, 1860.

The record in this case discloses the following state of facts, to-wit:

On the 5th day of October, 1854, John B. Standridge and Dulcinea Padgett were married in due form of Law. The parties lived together in harmony until some time in the Spring of 1855, when the said Dulcinea, being in feeble health, went back to her father's house, and remained there sick until August, 1855. She was solicited and importuned to return to the home of her husband, but peremptorily declined to do so, at the same time avowing her determination never to live with him again. She persisted in her refusal to live with her husband until he removed to the State of Georgia, and more than three years had elapsed from the time she refused to return to her husband's home and the filing of the Libel for Divorce in this case. The marriage and the separation both occurred in Cherokee county and State of North Carolina, and the said Dulcinea never did reside in Georgia. Under these circumstances, John B. Standridge filed a Libel in Towns Superior Court against the said Dulcinea, praying a dissolution of the marriage contract, on the ground of willful and continued desertion of him by the said Dulcinea for more than three years anterior to the filing of said Libel. Service of the Libel was duly perfected by publication, according to the Laws of this State, and the defendant appeared by her counsel and answered said Libel, alleging, first, that she was not guilty of the desertion charged, and, second, that, if she was, it was entirely the fault of the plaintiff, and owing to his habits of intoxication and cruel treatment of her.

Standridge vs. Standridge.

The only question made in the case is: whether or not the Superior Court of Towns county had jurisdiction to decree a divorce between the parties?

The presiding Judge in the Court below awarded a nonsuit of the plaintiff, on the ground that the Court did not have such jurisdiction, and the plaintiff excepted, and now assigns the decision as error.

WEIL & PHILLIPS, for the plaintiff in error.

MARTIN, represented by EZZARD, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Had the Court jurisdiction of this case? We think so most clearly. The husband had been a citizen of this State for two years before the Libel was filed. The Act of 1802.—*Cobb*, 223—passed to carry out the 9th Sec. of the 3d Article of the Constitution makes express provision for service by publication in Divorce cases, where the defendant is out of the State. Of course, this gives the Court jurisdiction under the Law, whatever may be the force and effect of the judgment rendered in the case elsewhere than in Georgia. The Statute of the State having provided this mode of service, which, the record shows, was observed, how can a Georgia Court refuse to act upon it?

But, here, the defendant appeared by Attorney—as it is declared a defendant may do, under the Act already cited—who does not, in the language of the Judge, protest all the time against the proceeding. But, on the contrary, there is no plea filed to the jurisdiction of the Court, but a plea of the general issue, and a special plea to the merits of the Libel, denying the culpability of the wife, and charging upon the husband, as the cause of her abandonment, the drunkenness and ill-treatment of her husband. If this will not confer jurisdiction upon the Court, nothing short of personal service can. But such, we apprehend, is not the Law.

As to the ground of Divorce, the Courts will judge that by their own Law, and not by the Law of North Carolina, where the parties were married. Desertion may not be a sufficient cause for dissolving the contract in that State, but if it is in this State, the Divorce will be granted.

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Without intending to reflect upon the wife in this case—for I take it for granted, the libellant is to blame—still I warn all plain men against marrying women by the euphonic names of Dulcinea, Felixina, &c., these melting, mellifluent names will do for novels, but not for every-day life.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in non-suiting the case for want of jurisdiction.

HORTON *et al.* vs. MERCIER *et al.*

A testator, by his will, left, amongst other things, certain property in the possession of his son-in-law to his daughter and her children. One share of the residue of his estate, not disposed of by his Will, he directed to be settled in trust upon his daughter and her children. The son-in-law was appointed trustee, and filed his bill to recover his wife and children's share of the residue. The executors resisted a recovery, unless he would declare, in writing, that he held the property, mentioned in the fifth item, and in his possession at the death of the testator, as a part of the trust estate of his wife and children. *Held*, that the Will did not make a case for election. Stubb's Act of 1857, to simplify Equity Pleadings, construed.

In Equity, in Troup Superior Court. Tried before Judge BULL, at the May Term, 1860.

This case came up for a hearing upon the following state of facts, to-wit:

On the 26th of October, 1850, Jeremiah Horton made and published his Will in due form of Law.

The first item of the Will contains a bequest of certain lands to Frances Horton, the testator's wife, for her own

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use and benefit during her natural life or widowhood, and at her death, to his son, John H. Horton; also, certain slaves, named, and all other slave property, of which the testator might die possessed, not otherwise disposed of in said Will; also, all the stock of every description, not otherwise disposed of in the Will, together with a wagon and gear, ox-cart, pleasure carriage, cotton gin, and all other undisposed of items of property, of which the testator might die seized and possessed, to be held and enjoyed by his said wife during her natural life or widowhood, with power to sell any of said property, and invest the proceeds as she might think best for the interest of her and her children.

The second item contains a bequest of certain lands to the testator's sons, Thomas R. Horton and Jeremiah S. Horton, to be equally divided between them, by sale or partition, as they may think fit.

The third item contains a bequest of certain slaves and money to the testator's daughter, Mrs. Eliza A. Duncan, to be secured to her and her children.

The fourth item contains a bequest to the testator's son, Thomas R. Horton, of certain slaves and other property.

The fifth item contains a bequest to the testator's daughter, "Mrs. Rebecca M. Mercier, the following negroes: Hannah, a woman, and her increase; George, a boy; Bill, a boy; and Jim, a boy—to her and her children, forever, which said negroes have heretofore been delivered to her."

The sixth item contains a bequest of certain negroes and other property to the testator's son, Jeremiah S. Horton.

The seventh item contains a bequest of certain negroes and other property to John H. Horton, a son of the testator.

The eighth item provides, that the property bequeathed to Jeremiah S. Horton and John H. Horton should be retained and managed by the wife of the testator until they arrived at full age, and that, if any of the negroes bequeathed to said sons should die or become disabled before the majority of said sons, it should be made up to them at the death or marriage of their mother, or sooner, if she could spare it.

The ninth item directs: "That, if either of the testator's sons should die during their minority, and without marriage or issue, then their distributive share, or shares, should revert back to his estate, to be held by his wife during her life or widowhood, and at her death to be distributed as directed in the next item."

The tenth item provides, that, should the testator's wife see proper to marry again, she shall, first, be made equal with his children in the distribution of his property, and then the balance in her hands, not otherwise disposed of, to be sold and equally divided between her and the testator's children, and in the event of her death, unmarried, then the said property to be equally divided among all my children, and that the shares, or portions, to which Mrs. Duncan and Mrs. Mercier may become entitled under this clause of the Will, shall be secured to them and their children by the executors of the Will, who were empowered to make such conveyance in trust or otherwise, as should secure the said shares to the sole and exclusive use and benefit of the said Mrs. Duncan and Mrs. Mercier, and their children, and in the event of the death of either of the testator's said daughters, without issue, then their said distributive shares should revert back to said estate, to be equally distributed amongst the balance of the testator's children.

The eleventh item imposes a forfeiture on any one of the testator's children who refuses to bear his or her equal proportion of the expense of any law-suit, or judgment, that may come against the estate.

The twelfth item appoints the testator's wife, Frances Horton, executrix, and his two sons, Thomas R. Horton and Jeremiah S. Horton, executors of said Will.

After the making of the will, and before the death of the testator, Mrs. Frances Horton and John H. Horton both died—the said John H. Horton leaving neither wife nor children.

The testator died, leaving the said Will in full force, and the same was duly proven and recorded, and the said Jeremiah S. Horton and Thomas R. Horton assumed the execution of said Will as executors.

Thomas D. Mercier was duly appointed trustee for his wife, Rebecca M. Mercier, and her children, with notice to, and by consent of, said executors, and, as such trustee, filed his bill in the Superior Court of Troup county, against the said executors, praying that they might be decreed to account and pay over to him the one-fourth part of the proceeds of all the property bequeathed to the said Frances Horton in and by said Will, and also the one-fourth part of the proceeds of all the property bequeathed to the said John H.

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Horton, and also the one-fourth part of all the property & otherwise specifically disposed of by said Will.

To this bill, the executors filed their answers in the nature of a cross bill, alleging, amongst other things: That, in the opinion, the trust, declared in the tenth item of the Will of the testator, attaches in all its terms to the property bequeathed by the fifth item of the Will, and they pray in the said answer, that guardians *ad litem* may be appointed to represent the children of Mrs. Rebecca M. Mercier in the litigation, and that Thomas D. Mercier may be decreed to declare his acceptance of the trust as to all the property mentioned in said Will, or that he may be charged therewith by the decree of the Court, and that said executors may be fully instructed as to their duty in executing said Will in relation to the question whether or not the property given to Mrs. Mercier by the fifth item of said Will, is not subject to the same trust which is declared in and by the tenth item of said Will.

Thomas D. Mercier, in answer to the allegations of the answer of the executors, alleges: That the negroes mentioned in the fifth item of the Will were given to him and his wife shortly after their marriage, and before the Will was made; he admits that his children are interested in the decree to be pronounced in this case, but says that he has been appointed trustee for them, and is ready to protect their interests.

The answer of Thomas D. Mercier was excepted to by counsel for the executors on several grounds, which need not be stated.

The exceptions were overruled, on the ground that the executors were not entitled, either as such executors, or by their individual character, to the relief prayed for in the answer, and this decision is the error assigned in this case.

B. H. BIGHAM, for the plaintiff in error.

BULL, for the defendants in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Jeremiah Horton, deceased, bequeathed by his Will a considerable estate to his wife and children, and directed, among

other things, that certain portions of his property, which he specified, should be, by his executors, settled in trust upon his married daughters—Mrs. Thomas Mercier being one of them. By the consent and co-operation of the executors, Thomas Mercier, the son-in-law, was duly appointed by the Court trustee for his wife and children; and under and by virtue of this appointment, he received from the executors upwards of \$1,800, and then filed his bill to recover the balance in their hands of the trust property coming to his wife and children, which the Jury have found to amount to \$1,100. and more.

The executors, under Stubb's Act, passed December, 1857, (*Pamphlet, p. 106,*) filed their answer in the nature of a cross bill, suggesting that, by the fifth item of his Will, Jeremiah Horton had given certain negroes—then in the possession of Thomas Mercier—to his wife and children, and alleging that Thomas Mercier was claiming these negroes as his own, by virtue of a gift made by the testator long prior to his death.

The executors insist that the Will presents a case of election, and that before Thomas Mercier is permitted to recover the balance of the trust money in their hands, that he shall be compelled, by some writing, to make known that he holds the negroes, already in his possession, as a part of the trust estate of his wife and children. They, further, express an apprehension that, inasmuch as they consented to the appointment of Thomas Mercier as Trustee, and paid him over a part of the trust fund; that if it should turn out that the slaves mentioned in the fifth item of the Will, belonged to the wife and children, and that they should be wasted, and that they, the Executors, took no steps to protect the rights and interests of the children, they would make themselves personally liable.

An answer was put in by Thomas Mercier to the answer of the executors, in the nature of a cross bill, which was excepted to for insufficiency, and upon argument upon the exceptions, the Court held, there was no need for an answer at all, for the reason that the executors had no right to interfere in the matter.

And this, by the way, presents a case for the construction of the Act of 1857, and for the establishment of the practice under it. The Statute does not prescribe what shall be done,

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provided there be no equity in the case, made by the answer in the nature of a cross bill. Shall it be demurred to? or shall the original complainant, now a quasi defendant, refuse to answer?

Having no respect for forms, myself, I look upon it as quite an immaterial matter. At any rate, we see no reason for overruling the course pursued by our Brother Bull. Like myself, he always looks to the substance of things, disregarding the shadow.

The question presented is: Was this a case of election?

Much authority was on hand to discuss this doctrine of election. No reference, however, was made to *McGinnis vs. McGinnis*, (1 *Kelly*, 496,) where this doctrine is fully treated.

Election is of two kinds—positive and constructive. If two legacies are left in the alternative to the same legatee, he must elect which of the two he will take. He is not allowed to claim both. But there are also cases of constructive election, where the taking of one thing would be inconsistent with the idea of taking another. The Courts look to the intention of the author of the instrument. This intention is supposed to extend to the whole instrument; and that some part of it would be frustrated, if the whole is not carried out. The principle goes further, and holds that, by taking a benefit under the instrument, you affirm the whole, and agree to submit to the burdens which it imposes.

Apply these tests to the case under consideration. Suppose the wife and children of Mercier never get the property attempted to be disposed of by Jeremiah Horton, by the fifth item of his Will, his intention is neither marred nor frustrated, as to his general dispositive scheme. They still take, in common with all the other children, their equal share or portion of all the property in which a trust was created, there being no trust declared by the Will as to the property contained in the fifth item. Had the testator known that Mercier would claim these fifth item negroes as his own, there is no reason to suppose that he could have given any more of his estate to Mercier's family. They are made equal participants with the rest in all the residue of his estate.

And, then, what benefit does Mercier take that should require him to renounce his claim to the fifth item property? None whatever. He was not nominated trustee by the Will. Suppose some one else had been appointed—as any body else

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might have been—what, then, would have become of this question of election? That trustee would have claimed what Mercier is contending for, and Mercier would not have been heard from at all. He would simply have retained possession of the property which he already holds, leaving the trustee to prosecute the rights of his wife and children. He being trustee, does not alter the legal view of the question. In truth, the executors are seeking to make a case of election, not under the Will—where alone it can arise—but outside of the Will, which cannot be done.

If the executors feel it to be their duty to attempt to recover the fifth item negroes, either as executors of Jeremiah Horton, or next friend or guardian of the children, let them do so. Suit may be immediately instituted and the remedy at Law is fully adequate and complete to try the titles to the fifth item property.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

Stewart vs. The State of Georgia.

STEWART vs. THE STATE OF GEORGIA.

When four are indicted for disturbing religious service, and one of them, who participated in the disturbance, is convicted, a new trial will not be granted on the ground that the verdict is contrary to evidence, there being sufficient evidence to warrant the conviction.

Indictment for a Misdemeanor, in Milton Superior Court. Tried before Judge RICE, at the June Term, 1860.

At the August Term, 1856, of Forsyth Superior Court. John Brown, John J. Stewart, John Stewart and John Isom were indicted in the same bill, for the offence of Misdemeanor, in disturbing and interrupting a congregation of free white persons, assembled for religious worship.

Pending the indictment, the county of Milton was formed, partly of the territory of Forsyth county, and said indictment was transferred to the Superior Court of Milton county for trial.

On the trial of John J. Stewart, alone, the following testimony was introduced:

Evidence for the State.

DAVID BUISE, the Prosecutor, testified: That on the night of the 4th of July, 1856, at Mount Pisgah Methodist meeting house, in what was then Forsyth, but now Milton county, whilst a congregation of white persons were then and there assembled for worship, and during the time of Divine service. John Brown, John J. Stewart, John Stewart and John Isom came into the church and sat down together, in the back part of the house; and whilst the congregation were at prayer some one back where the defendants were sitting, groaned and said amen, very loud. After prayer, (as witness thinks) the defendants went out of the house, and round to the side of the church where the women were, and began to pat and dance, and say everything that was mean, and halloo like a peacock, and bellow like a bull, and curse the Minister, which noise continued pretty much during the service. Witness does not know which ones of the crowd did the patting and dancing or made the other noise out of doors. Witness went out of doors to stop the disturbance, and John J. Stewart was sitting down at the root of a tree, and when

witness went up to him the parties named in the indictment came up and squatted down around the defendant now on trial. Witness said to John J. Stewart: "I have one request to make of you, and that is, just go away all of you, and stop this and let us alone;" to which the defendant replied by saying: "What do you mean?" Witness rejoined that, "I mean what I say." The defendant then told witness that if he, witness, wanted anything off of him he could get it. John Brown then jumped up behind the defendant and said to witness: "If you want a fight out of our crowd, I am the man." Witness then went back in the house. Afterwards, John Brown came back into the house and cocked a pistol, or snapped it, or let down the cock, so that everybody could hear it. The congregation were greatly interrupted and disturbed. There was a pistol fired off near the church after the congregation broke up. Witness did not see or hear the defendant on trial do or say anything that night that might disturb the congregation, except what he said to witness out of doors, and before testified to. The defendant came into the church with the other persons named in the indictment, and went out with them. Witness took the groaning and exclamation of amen, before stated, to be irreverent.

SAMUEL M. LAMBERTH, testified: That when the persons named in the indictment came into the church, and some one groaned during prayer, witness went up to where they were sitting, and asked John Stewart, who was making the noise? Said John Stewart asked if there was anything wrong in it? and witness told him he thought there was. He then asked witness if he wanted to fight? The other persons named then got up and went out, and the defendant now on trial went out after them. Witness did not see John J. Stewart do or say anything to disturb the congregation. There was considerable fuss outside the house after they went out.

William Thomason testified substantially to the same, as detailed by Lamberth, and also that after the congregation had dispersed and started home, witness, and others with him, passed the persons named in the indictment, some distance from the church. Some of them had liquor, and pulled out a flask or bottle, and asked the defendant on trial to drink, to which he replied: As it is you I'll drink. They did not disturb or attempt to disturb us. I did not see the defendant do, nor did I hear him say, anything out of the

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way, or that would or did disturb the congregation. He and the other persons named in the indictment left the place and went off together, after the congregation broke up.

Evidence for the Defendant.

SIMEON SCOLES, testified: That he was at the church on the occasion testified to by the witnesses for the State, and saw the persons named in the indictment when they came out of the house. When they came out John J. Stewart sat down at the root of a tree. John Stewart (Illinois John) and John Brown were patting and dancing, and the defendant on trial told them to quit it and behave themselves. The witness was sitting down by the tree with John J. Stewart, and was close by him all the time, and saw him all the time, and all that he did was to try to get the others to quit. The witness saw and heard all that he did, and he neither said or did anything to disturb the congregation. Witness does not recollect telling Daniel Buise, the day after the difficulty, that John J. Stewart said "go it, boys;" the said John J. Stewart did not say "go it, boys," as witness recollects. Witness did not go inside the house, but remained outside.

Evidence for the State in Rebuttal.

David Buise being re-introduced, testified, that on the day after the difficulty he was trying to get up evidence for the prosecution, and Mr. Scoles told him that all he heard John J. Stewart say was "go it, boys." Said Scoles was sworn as a witness before the Magistrates, and did not so swear, but then testified as he now does in this case. When the persons named in this indictment first went out of the church, after Mr. Lamberth spoke to them, the others walked ahead, and John J. Stewart followed immediately after them.

Upon this state of facts the Jury returned a verdict of guilty, against the defendant, John J. Stewart.

Counsel for defendant then moved for a new trial, on the grounds:

1. That the verdict of the Jury in said case was contrary to Law and the charge of the Court.
2. That the verdict was without sufficient evidence, contrary to the evidence, and strongly and decidedly against the weight of the evidence.
3. That the Court erred in admitting the evidence of William Thomason, as to what took place as the defend-

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ant, and those with him, were leaving the church, and particularly what occurred a considerable distance from the church after the congregation dispersed, said evidence being objected to by counsel for defendant.

The Court overruled the motion and refused the new trial, and that decision is alleged to be erroneous.

BELL, IRWIN & LESTER, for the plaintiff in error.

PHILLIPS, Solicitor General, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

This plaintiff in error went into the church in company with three others; all are seated together, and all are drinking. One of the four makes a mockery of the service, and when some one of the congregation inquired who it was—for the purpose of suppressing or rebuking the offender—the plaintiff is the leader of the party to take it up. He inquires if there is any harm in it? And when he was told there was, which he well knew before, he asks the person who made the inquiry of him, “*if he wanted to fight?*” Was this proper, or was it not a disturbance? After this all go out of the house, and while the service is going on, some, if not the whole, engage in a scene of riotous and offensive noise and abuse that would disgrace wild savages. Another member of the congregation goes out and requests the plaintiff to go off from the church and let them alone. To this the plaintiff expresses astonishment; wants to know what it meant, and if anything is wanted off of him it could be got. This fellow was keen for a fight. The others run up and ‘squat’ around, and one of them, at the conclusion of the plaintiff’s speech, jumps up and exclaims: “If you want a fight out of *our crowd*, I’m the man.” The man of peace and order had to beat a retreat. One of the crowd goes into the house and snaps his pistol, and thus the disturbance is kept up during the service. And as the congregation disperse this crowd stand in the way passing the bottle of whisky around, the plaintiff making himself particularly conspicuous. Can any one doubt, under this evidence, that his conviction was proper? We do not; and, as for myself, the only regret I have, is that the Law did not authorize a

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six months' imprisonment, and that all of its penalties could have been administered to him.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

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1. Where all the evidence has been allowed to go before the Jury, and the Court is satisfied that the verdict is fully sustained by the proof, and the ruling of the Court upon the case is more favorable to the defendant than he had any right to ask or expect, a new trial will not be granted.
2. An involuntary killing happening in the commission of an unlawful act, which, in its consequences, naturally tend to destroy the life of a human being, or if committed in the prosecution of a riotous intent, or of a crime punishable by death or imprisonment in the Penitentiary, shall be deemed and adjudged to be Murder. Nor can the offence be excused or mitigated by proof, that the accused had no ill-will or actual malice toward the deceased.

Indictment for Murder, in Forsyth Superior Court. Tried before Judge RICE, at the April Adjourned Term, 1860.

Isaac Freeland, Jacob Pettyjohn, Levi Q. C. McGinnis, and William R. Braunon, were jointly indicted for the Murder of Claiborn Vaughan. The first count in the indictment charged them all as principals in the first degree; and the second count charged Isaac Freeland as principal in the first degree, and the other four defendants as principals in the second degree. The defendants elected to be tried separately, and Levi Q. C. McGinnis was put upon his trial, when the following evidence was introduced, to-wit:

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Evidence for the State.

WILEY VAUGHAN, testified: That he was the prosecutor in this case, and the brother of the deceased; that on the 7th of August, 1858, the witness, Claiborn Vaughan, William Buise, Samuel Buise, Abraham Buise, and Ransom Barnes, called the "Buise crowd," left Wild-Cat Court ground, in Forsyth county, and started home by the usual and direct route; that witness and his brother, Claiborn Vaughan, were riding on horseback, whilst the balance of his crowd were on foot; that the Buise crowd were pursued and overtaken about a half a mile from the Court ground, by Isaac Freeland, Jacob Pettyjohn, Levi Q. C. McGinnis, and William Freeland and others, called the "Freeland Crowd;" that the Freeland crowd had a torch-light, and came along singing a corn song, the words: "Walk Tom Walker, walk away, you damned South Carolinians, walk away;" that all of those persons constituting the Buise crowd, were raised in the State of South Carolina; that as the Freeland crowd came up to the Buise crowd, Isaac Freeland, William Freeland, Jacob Pettyjohn, and Levi Q. C. McGinnis were foremost, and Levi Q. C. McGinnis said "Where is Wiley Vaughan, the damned rascal who hit me on the head with a stick?" to which witness replied that he neither hit witness nor any one else on the head with a stick; that Isaac Freeland, and one or two others with him, then passed witness and ran on to where William Buise was; heard something like a lick, and the light was extinguished; that witness then jumped from his horse because some of the Freeland crowd was before him, and he wanted to get out of the way; that witness left Claiborn Vaughan setting on his horse, by the side of the horse which he dismounted, and witness went off in the direction of home, and overtook William Buise and Samuel Buise near the branch, at which place Abraham Buise and Ransom Barnes soon joined them; that as witness went away from where he left Claiborn Vaughan, he heard several voices, or one voice several times, hallooing: hurrah! hurrah! hurrah, Freeland, which seemed to proceed from the spot where he left Claiborn Vaughan; that witness and those with him at the branch, remained there for an hour or more, waiting for Claiborn Vaughan to come along; that whilst they were thus waiting, the two horses which witness and deceased had been riding, came along; the horse that deceased had been riding, being

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destitute of either bridle or saddle; that the crowd at the branch were joined by Marcellus Buise, William Buise, jr., Elisha Buise, David Wilson, and, as witness thinks, old man Key; that a torch was procured, and the company returned to where Claiborn Vaughan was left, and found him lying in the road dead, and within a few feet of where he was when witness left him; the body of the deceased was very bloody and his shirt could not have been distinguished from red flannel, without close inspection, on account of it; that the ground was bloody, and some blood was spattered upon the saddle, which was lying in the road, bottom-side up, and the coat and hat of deceased were lying in the road near the saddle, and the hat was cut in two or three places; the deceased was killed about eight or nine o'clock at night, and in Forsyth county; that William Buise, jr., was sent after the Coroner, and that the balance of the Buise crowd and those that had joined them, remained with the body until morning, no one touching it until the Coroner came.

On cross-examination, the witness further testified: that he was unable to identify the prisoner as one of the singers, whilst the Freeland crowd were pursuing the Buise crowd: that the witness had not hit prisoner with a stick, but he and witness and the deceased were all friendly with each other up to that time, so far as he knew; the deceased had been living, temporarily, with John Mathews, who lived on the road from Wild Cat Court Ground to Atlanta, but deceased was going home, on the night of the homicide, with the witness; that, so far as the witness knew, the deceased was on friendly terms with all the Freeland crowd up to the night of the killing; that on the morning after the homicide, Isaac Freeland came to where the body of the deceased was lying and said that he had been in an affray there last night and had lost his pocket-knife, and his son, William, had lost his pocket-combs, and that he had come back to look for them. and to see what was done, and said Freeland also said that he would as soon kill a man who would hit him on the head with a stick, as to kill a dog; that Isaac Freeland was bloody in his crotch, and between his legs, and about his pockets. and had blood spattered, more or less, all over him; that the witness did not see or hear the prisoner do or say anything out of the way on the night of the homicide, except the remark made to witness as they first came up, and which has been

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already repeated; witness gave a bond to prosecute this case.

JEREMIAH FREELAND, testified: That he was at Wild Cat Court Ground, in Forsyth county, on the 7th of August, 1858, when a fight occurred between the prisoner and Abraham Buise; that, after the fight, there was a good deal of jowering about amongst each other, between the Buise crowd, (which consisted of William Buise, Samuel Buise, Abraham Buise, Wiley Vaughan and Claiborn Vaughan,) and the Freeland crowd, consisting of Isaac Freeland, Jacob Pettyjohn, Levi Q. C. McGinnis, James McGinnis, William Braunow, William Freeland and the witness; that, about the time and before the Buise crowd left for their homes, the two crowds were cursing each other back and forth, William Buise and the prisoner at the bar doing the bigger part of the cursing; that the Buise crowd, or rather William Buise, called the Freeland crowd rogues, hog-thieves, and the like, and prisoner and Jacob Pettyjohn replied, calling the Buise crowd the same; that this jowering and cursing continued until the Buise crowd started on home; that, after they had left a little while, Jacob Pettyjohn and William Freeland sent the witness after a torch-light, as they said, to hunt for a bottle and combs, said to have been lost; that, after some search for the things said to be lost, some one of the Freeland crowd (witness not remembering who it was) proposed to follow the Buise crowd—the specific object of the pursuit not being avowed; that the Freeland crowd then pursued the Buise crowd, singing a corn song as they went along; that witness went with the crowd to keep his father, Isaac Freeland, out of a difficulty, and witness tried to get his father and the Freeland crowd, generally, to go back, but could not; the Freeland crowd overtook the Buise crowd between a quarter and a half mile from the Court Ground; that, when the one crowd overtook the other, some of the Freeland crowd told William Buise (who were standing in the road with sticks) to get out of the road and let them go by, which they did; that the Freeland crowd then passed on and, coming up to Wiley Vaughan and the deceased, Isaac Freeland went up to Wiley Vaughan to show him where some one had struck him with a stick, to which Wiley Vaughan replied, “I did not strike you;” that Isaac Freeland then went up to Samuel Buise to show where he had been stricken, to which Samuel Buise replied: “I did not strike you;” that Isaac Freeland

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then went up to old man William Buise for the same purpose, and William Buise replied; "It was not me that struck you, God damn you," and forthwith struck Isaac Freeland two blows and ran off down the road, all of the Freeland crowd, except witness, running after him; that in a few minutes, he heard hallooing as if they were fighting, and when he went down to where they were hallooing hurrah, Isaac Freeland was just getting up from Claiborn Vaughan, and Jacob Pettijohn was sort of patting Isaac Freeland on the back, and the prisoner at the Bar, and the rest of the Freeland crowd were standing around; that Claiborn Vaughan got up on his hands and knees and crawled to the upper edge of the road, saying: "Boys, I'm a dead man;" that prisoner was standing close to deceased, rather to one side, when witness first went down to where they were crying hurrah; that the Freeland crowd then started back home, the way they had come, when prisoner at the Bar said wait a little; that witness then heard a sort of scuffling back at the place where Claiborn Vaughan was lying on the ground, and he looked back and saw the prisoner at the Bar coming right from him, saying: "there is nothing wrong," or "nothing the matter," or something like that, and the Freeland crowd went on back toward the Court Ground to their homes; that on the way Isaac Freeland stopped at the branch to wash his hands.

The witness being cross examined, further testified: That he knew of no common design or purpose on the part of the Freeland crowd to do any particular act when they overtook the Buise crowd; that the witness knew of no common cause of quarrel between the two crowds; that, so far as witness knew, prisoner and deceased were friendly up to that time; that the prisoner and Isaac Freeland had been unfriendly for about six years, and had had law-suits with each other; that the witness is unable to identify prisoner as one of the singers, or one of those that hallooeed hurrah, nor does he recollect any threat made by him after the pursuit of the Buise crowd commenced; that Isaac Freeland was drunk on the night of the killing, and as he went home, stopped and lay down some seventy-five or one hundred yards from the house, and fell asleep, was afterward helped up and went home; that Claiborn Vaughan was pretty drunk on the night he was killed; that the witness was sworn and testified on the trials of Isaac Freeland, and of Jacob Pettijohn, and of James

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McGinnis and William Braunow, in this Court, and also testified before the Coroner's Jury, and witness swore the truth each time: witness did not tell Hardeman Bone in his wheat field, during the harvest of 1859, that "he, witness, was not nearer than sixty yards to the place where the deceased was killed, on the night he was killed."

ABRAHAM BUISE, testified: That, on the 7th of August, 1858, at Wild Cat Court Ground, in Forsyth county, he and Jacob Pettyjohn were talking about some shooting that had been done that day, and the witness was trying to show that the judges had made a mistake in measuring the shots, and had awarded the money bet on the shooting to said Pettijohn wrongfully, and whilst this talk was going on, James McGinnis winked at Pettyjohn and told him to knock witness down; that, whilst witness and James McGinnis were contending about the remark made by James McGinnis, which he denied making, Levi Q. C. McGinnis stepped up and said: "Say what you please, Jim, for I'm your friend, and if you can't whip him, I can." and began to roll up his sleeves; that old man William Buise interposed, and witness and prisoner agreed that they had no cause of offence at each other, and consented to drop the fuss; that prisoner then proposed to go and take a drink and drop it: whilst the drinking was going on, the prisoner kept saying: "Drink your damned Carolina liquor;" witness picked up his gun and told William Buise to "come and let us go home:" that one William Bayley, who was very drunk, wanted to shoot with witness for money, which witness declined, on the ground that a fuss had well nigh resulted from what shooting had already been done: after some further wrangling, Bayley said he could beat witness shooting, or whip him either, to which witness replied: that, as drunk as he (Bayley) was, the witness could whip four such, if he were of a mind to lay himself out to fight; that prisoner then told Bayley to knock witness down, to which witness replied, he, prisoner, had better do it; that prisoner then seized witness' gun, and in scuffling over the gun, prisoner brought it a jerk and hit witness in the face with the butt of the gun; that witness then struck prisoner and they went to fighting; after the fighting ceased and the combatants were separated, witness sat down in the corner of the fence, and when asked by William Buise if he was hurt, witness answered that he was not, except where some

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one had struck him on the neck with a stick during the fight; prisoner then came up and said he intended to whip witness again; witness told him to let him alone, that his neck was hurt and that he did not intend to fight any more at that time; Isaac Freeland came up and said: "Boys, let him alone (that is witness,) I consider him as begging;" prisoner then said to witness: "If you don't leave, I will kill the last damned South Carolinian there is of you," upon which Isaac Freeland told witness to get the old man Buise and leave, saying: "If you don't leave, there will be hell to pay here directly;" witness answered that if he had his gun and shot bag, he would go; witness and his crowd, called the Buise crowd, consisting of the three Buises, the two Vaughans and Ransom Barnes, then started home; from the main road, leading toward the homes of the Buise crowd, there was a little path to the spring, down which witness turned to get some water; whilst witness was drinking at the spring, the Freeland crowd (consisting of the persons named by the other witnesses) came on down the road to the place where the spring-path diverged, and were cursing witness and the Buise crowd, saying that they had better leave and go home, for that they were all run from their country for stealing or forgery, or some other damned meanness; witness being afraid to go back to the main road by the path leading to the spring, went through the swamp and joined his crowd some distance beyond where the Freeland crowd was; old man Buise replied to the charge of being run from our country for crime, by saying that prisoner was a damned old Penitentiary convict; the Buise crowd then went on some distance further and halted for some little time, waiting for the Freeland crowd to go back, so that witness might return and get his shot-bag, which, in his hurry, he had left at the spring, and also get one of old man Buise's bridles, which the horse had slipped; whilst thus waiting, the Buise crowd discovered a light coming on from toward the Court Ground along the road after them, and the Freeland crowd came on singing a song to the words: "Walk, Tom Walker, walk away, we'll make the damned South Carolinians walk away;" the Buise crowd were all South Carolinians; when the Buise crowd saw the light coming and the Freeland crowd in pursuit of them, they started on toward home, going the direct road to their respective homes, except Claiborn Vaughan.

who was residing for the time at Mr. Matthews', but was going home with old man Buise, where his brother, Wiley Vaughan lived; the Freeland crowd continued to sing until they came up to within thirty or forty steps of the Buise crowd, when they rushed upon the Buise crowd; witness left the road some thirty or forty steps and sat down upon a log; when the one crowd rushed upon the other as before stated, something was said between old William Buise and Isaac Freeland, but the witness could not hear the words distinctly; then there was a lick struck and the light was extinguished, after which, for about a half minute, no one spoke, but from the noise it seemed that there were persons running; some one then spoke back at the place where witness left Claiborn Vaughan in the road, and said: "Is this Wiley Vaughan, the damned rascal that struck me with a stick, back at the Court Ground?" witness took the voice to be that of Isaac Freeland; the person addressed replied: "No, it is not Wiley Vaughan but Claiborn Vaughan;" this last voice witness took to be that of Claiborn Vaughan, with whose voice he is very well acquainted; the other voice then said: "You are a damned South Carolinian, and you were with the damned South Carolina crowd;" to which Claiborn Vaughan replied: "Yes, I am a South Carolinian and was with the South Carolina crowd, but I take no part in their fighting scrapes;" the other voice, which witness took to be Isaac Freeland's, then said: "We take in all the South Carolinians," or "it is South Carolina blood we are after;" then witness heard a lick struck with a stick, and from the noise it seemed as if some person fell, and witness then heard the words hurrah! hurrah! hurrah, Freeland, which seemed to be uttered by the whole crowd; witness then heard the voice, which he took to be that of Claiborn Vaughan, say: "Boys, I surrender," and then to cry "murder!" as often as twice—the last time with a sort of choking noise; witness then heard a noise as of some one scuffling, and it seemed that some one was kicking or knocking him in the body, at the same time saying: "Are you dead, God damn you, old man?" this the witness took to be Isaac Freeland from the voice; about one hour after this time, the witness, in company with the persons enumerated by Wiley Vaughan, returned to the place where he left Claiborn Vaughan, and found him lying in the road, dead.

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The witness being cross examined further testified that the deceased was not engaged in any quarrel or fight that day at the Court ground, and, so far as witness knows, was friendly with every one of the Freeland crowd. There were members of each crowd who were friendly with each other, nor was there, on the day of the homicide, any quarrel or fight or difficulty, in which all of the one crowd were arrayed against all of the other. Isaac Freeland came to where the body of the deceased was lying, on the next morning after the homicide, and said that he understood old man Buise had hit him with a stick the night before, and he had as lief kill a man who would hit him with a stick as to kill a dog. All of the Buise crowd had drank some liquor that day, except Samuel Buise and Ransom Barnes. Witness testified before the Coroner's Jury, and on the trial of Isaac Freeland, and of Jacob Pettyjohn, and of James McGinnis and William Brannon, and on these different examinations swore the truth just as near as he could recollect it.

Dr. AARON P. BROWN testified: That he was a Licensed practising physician, and served as the Surgeon of the Coroner's Jury, when an inquest was held over the body of Claiborn Vaughan; that the body was lying in the road leading off in an easterly direction from the Wild-Cat Court Ground, in Forsyth county, and about a half a mile from said Court Ground. The body was very bloody, and the shirt in which it was clad could scarcely be distinguished from red flannel. so completely was it bathed in blood; there was a good deal of blood in the road round about where the body was lying. There was upon the body thirteen wounds, three or four of which were in the region of the left shoulder-blade, and penetrating to and hitting against the shoulder-blade; there were also two or three wounds in the region of the fourth and fifth short ribs, which penetrated to and hit against the ribs on the left side; there was one wound between the angle and the point of the chin, on the right side of the lower jaw-bone, about three inches long, and cut in an inward and downward direction, about an inch and a half deep; there was also a fatal wound on the left side of the neck, about two inches and a half long, cut in an inward and downward direction, and penetrating and opening the left external jugular vein, from which last wound the said Claiborn Vaughan died of hemorrhage in a short time after the infliction of the

wound; the other wounds upon the body were of a superficial character. and, in the opinion of the witness, all of the said wounds were inflicted with a knife or other sharp-edged instrument of like character.

The State also introduced in evidence the bill of indictment, with the verdict thereon of guilty of Murder, against Isaac Freeland, and the sentence of death pronounced against him by the Court, and closed.

Evidence for the Defendant.

MAHLON H. JAMES testified: That, as constable, he sent by the Coror to the defendant's house for the purpose of examining the clothes worn by the defendant on the night of the homicide, and was instructed to bring said clothes to the place of the inquest if he found blood on the clothes, and to leave them if he found no blood on them; that he did go, and did examine the clothes and found no blood upon them, and left them; that witness went to the Wild-Cat Court Ground, on the morning of the 7th of August, 1858, in company with the defendant and the deceased, and they seemed to be perfectly friendly; that the defendant and Isaac Freeland had been unfriendly for eighteen months or two years before the homicide, and had had lawsuits and quarrels and one fight with each other; that Isaac Freeland was a stout man, and fractious, and would readily fight when insulted; that for two months before the homicide, there was bad feelings between Jacob Pettyjohn and the defendant, and they had had a difficulty which led to a prosecution of Pettyjohn by defendant, for an Assault and Battery. On the morning of the 7th of August, 1858, the deceased mended the shoes of defendant as a voluntary act of kindness.

Counsel also introduced in evidence a bill of indictment for Assault and Battery against Jacob Pettyjohn, found true by the Grand Jury, at the August Term, 1858, of Forsyth Superior Court, of which indictment the defendant was the prosecutor.

MATTHEW STRICKLAND testified: That he was at the place where the body of deceased was lying on the morning after the homicide; that Isaac Freeland came there with blood on his clothes, about his pockets, thighs, and other parts of his body. Freeland said that he had had a fight with Claiborn Vaughan there the night before; that he had been struck

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with a stick and was very mad, and if he had done wrong he had done wrong.

HARDEMAN BONE testified: That he was at the Wild-Cat Court Ground on the 7th of August, 1858, and saw deceased and defendant frequently together during the day at the wagon from which the witness sold liquor; that they seemed to be on friendly terms; they had come together to the still-house of witness a short time before that, and seemed perfectly friendly; that just about sundown the defendant bought a bottle of liquor and gave it to the deceased, upon deceased asking him for it, saying that he wanted it for a morning dram, and defendant had some at home; that Jeremiah Freeland cut wheat for the witness during the harvest of 1859, and in a conversation with witness the said Jeremiah Freeland remarked that he did not know that Claiborn Vaughan was killed until the next morning, and that he was about sixty-five or seventy yards from the fuss until it was all over.

JAMES R. BEAVER testified: That he saw Isaac Freeland on the day of the inquest on the body of Claiborn Vaughan: that said Freeland's clothes were bloody, and the inside of his pocket was bloody; that he has frequently seen the deceased and the defendant together, and they seemed perfectly friendly with each other.

The defendant then introduced the evidence as taken down by the Court on the trials of Isaac Freeland, and of Jacob Pettyjohn, and of James McGinnis and William Braunon, under the said indictment, for the purpose of showing that Jeremiah Freeland testified, on the trial of his father, Isaac Freeland, that when he went down to where the fight was going on, some one, whom he took to be William Braunon, was patting Isaac Freeland on the back whilst he was fighting Claiborn Vaughan; and that on the trial of Jacob Pettyjohn, he took said Pettyjohn to be the person who was patting Isaac Freeland on the back; and that on the trial of James McGinnis and William Braunon, the said Jeremiah Freeland testified that he, the witness, carried the light until the Buise crowd was overtaken by the Freeland crowd, when Isaac Freeland took the light from witness, and that witness thought the light was taken by Isaac Freeland after old man William Buise and Samuel Buise were passed in the road by the Freeland crowd.

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It was admitted in open Court, by the counsel for the State, that Isaac Freeland had been executed according to the sentence pronounced against him.

The testimony being closed, the presiding Judge charged the Jury as follows:

"All the presumptions of Law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved to be guilty. The burden of the proof is, therefore, on the State, to establish, by evidence, the crime charged against the prisoner. In this case, the State must prove the death of Claiborn Vaughan, the person alleged to have been killed, and that he died in consequence of the injuries inflicted upon him, as alleged in the bill of indictment; that Isaac Freeland was the slayer, and that the prisoner at the Bar was present, aiding and abetting the fact to be done, and that the killing was of malice aforethought. In other words, it is incumbent on the State to prove: 1st. That the act was done, which constitutes the offence charged. 2d. That it was done by Isaac Freeland, and that the prisoner was present aiding and abetting the fact to be done. 3d. That the act was done with malice aforethought. The killing, with time and place, must be established; that is, it must be proven that the killing was done in this (Forsyth) county, and that it was done previous to the finding of the bill of indictment. A crime or misdemeanor consists in the violation of a public law, in the commission of which, there must be a union or joint operation of act and intention or criminal negligence. Intention will be manifested by the circumstances connected with the perpetration of the offence, and the sound mind and discretion of the accused. Murder is the unlawful killing of a human being, in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either express or implied. Malice aforethought is the characteristic which distinguishes Murder from every other degree of homicide. Malice is either express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof. Where a deadly weapon is used in the infliction of an injury, this is evidence of malice, unless the circumstances under which the weapon was used, or some other evidence, shows that malice did not exist, and that the

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presumption of malice arising from the use of a deadly weapon is rebutted. Whenever the fatal act is committed deliberately and without adequate provocation, the law pronounces that it was done of malice, and it behooves him who committed the act, to show from the evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, or that the act was no offence at all; and persons charged as aiders and abettors of the act may do the same. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart. This implied malice is an inference or conclusion of law upon the facts which the Jury find proved. Malice is implied where an involuntary killing is committed in the prosecution of a riotous intent, and such involuntary killing is, therefore, deemed and adjudged Murder. If Isaac Freeland inflicted the wound which caused the death of Claiborn Vaughan, and if he was influenced therein by malice, either express or implied, as the Court has defined it, then Isaac Freeland was guilty of Murder, as principal, in the first degree; and if Isaac Freeland was thus guilty of Murder, and the prisoner at the Bar was present at the time the Murder was committed, aiding and abetting Isaac Freeland in the commission of such Murder, then the prisoner is guilty of Murder, as principal, in the second degree. The original bill of indictment, with the judgment of conviction thereon against the principal in the first degree, is admissible in evidence to prove *his* guilt, on the trial of the principal in the second degree; and it is a rule of evidence in such cases, that such record of the judgment and conviction of the principal in the first degree is conclusive evidence of his conviction, and *prima facie* evidence of his guilt, upon the trial of a principal in the second degree; and the burden of proof rests upon the principal in the second degree, if he denies and disputes the guilt of the principal in the first degree, to show that such principal in the first degree ought not to have been convicted. If, in this case, the State has shown by the record the trial and conviction of Isaac Freeland, then, so far as the guilt of the prisoner depends on, or is involved in the guilt of Isaac Freeland, the burden is on the prisoner to show that Isaac Freeland ought not to have been convicted of Murder—that he was not guilty of Murder. If the Jury are satisfied from

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the evidence, that Isaac Freeland killed Claiborn Vaughan, the deceased, and that in doing so he committed the offence of Murder, then the next inquiry for the Jury will be, whether or not the prisoner at the bar was present aiding and abetting Isaac Freeland in the commission of that Murder? All who are present aiding and abetting him who inflicts the mortal blow in cases of Murder, are principals and criminals. A person may be a principal in an offence in two degrees. A principal in the first degree is he who is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present aiding and abetting the fact to be done, which presence need not always be an immediate standing by, within sight or hearing of the fact, but there may be a constructive presence, as when one commits a robbery, murder, or other crime, and another keeps watch or guard at some convenient distance.

“Involuntary Manslaughter shall consist in the killing of a human being without any intention to do so; but in the commission of an unlawful act, or a lawful act which probably might produce such a consequence, in an unlawful manner: provided, always, that where such an involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the Penitentiary, the offence shall be deemed and adjudged to be Murder.

“The Penal Code of Georgia provides that where an involuntary killing is committed in the prosecution of a riotous intent, the offence shall be deemed and adjudged to be Murder.

“If any two or more persons, either with or without a common cause or quarrel, do an unlawful act of violence, or any other act, in a violent and tumultuous manner, such persons so offending shall be guilty of a riot. A riotous intent means an intent to do an unlawful act of violence, or any other act, in a violent and tumultuous manner, in which intent two or more persons must be joined. It means a common design in which two or more persons are united to do an unlawful act of violence, or any other act, in a violent and tumultuous manner. This riotous intent must be proved; but, like any other fact, it may be proved by circumstantial

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or direct evidence, or by evidence partly direct and partly circumstantial. This riotous intent may be proved, by proof of a common design to do an unlawful act of violence or any other act in a violent and tumultuous manner in which common design two or more persons unite, and by proof of acts done in pursuance of such common design. It is not necessary to prove that the parties to that common design actually came together and agreed in words and terms to have a common design, and to pursue it by common means. If it be proved that those persons who are engaged in a common purpose, pursue by their acts the same object, often by the same means, one performing one part, and another another part, toward the accomplishment of the same object, so as to complete it, the Jury will be justified in the conclusion that they were engaged in a combination or conspiracy to effect that object."

The Court also, at the request of counsel for the State, charged the Jury as follows, to-wit:

"It is not necessary to prove that the combination or conspiracy originated with the prisoner at the bar, or that he met with others during the time the combination, conspiracy or common design was being formed, for every person who enters into a combination, conspiracy or common design already formed, is deemed, in Law, a party to all acts done by any of the parties afterwards in furtherance of the common design. If the Jury are satisfied from the evidence in this case that there was a common design, combination or conspiracy into which the prisoner entered, and if the evidence satisfies the Jury that he was in a situation where he could give aid, and that he was ready to give and could give, such aid to the perpetrator of the act growing out of the common design, or connected with it at the time the act was perpetrated, it will be presumed that he was there for the purpose of giving the aid, unless it be shown satisfactorily that he was there for another purpose unconnected with the crime.

"If a company of persons are actuated by one common intent, the acts and sayings of the company and each member of it are admissible in evidence against any and every member of the company. If, therefore, the Jury believe, from the evidence in this case, that the prisoner and the crowd he was with were actuated by the same purpose, then he was not only with the crowd, but he was of the crowd, and the

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sayings and acts of any member of the crowd were his sayings and acts, whilst the common purpose was being carried on.

"If several persons engage in such a breach of the peace as in its consequences naturally tends to destroy human life, or engage in the prosecution of a riotous intent, or engage in the commission of any felony, and in carrying out the purpose, and connected with its execution a human being is killed, it is Murder in every one engaged in the common design, whether he struck the blow with his own hands or not."

The Court then, without request, charged the Jury as follows:

"If it is satisfactorily proved that Claiborn Vaughan was killed by Isaac Freeland in the prosecution of a riotous intent, and that the prisoner was engaged with Isaac Freeland in the prosecution of that riotous intent, then the prisoner at the bar is guilty of Murder as principal in the second degree. Where, however, a homicide is committed by one or more of a body of men, unlawfully associated, from causes having no connection with the common object, the responsibility for such homicide attaches exclusively to its actual perpetrator."

At the request of prisoner's counsel, the Court charged the Jury as follows:

"First. To constitute a crime, it is necessary that there be a union or joint operation of act and intention.

"Second. The Law presumes the prisoner innocent until the contrary appears, and this legal presumption of innocence is to be regarded by the Jury as evidence, to the benefit of which the prisoner is entitled, and it is for the State to prove the prisoner's guilt, and not for the prisoner to prove his innocence.

"Third. The Law requires that, unless the Jury are satisfied from the evidence, beyond a reasonable doubt, that the prisoner is guilty of the crime charged, they must acquit him; that this reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge; that the simple rule on this subject is, that the Jury must not convict the prisoner without plain and manifest proof of his guilt, and

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that each separate fact necessary to constitute the prisoner's guilt must be proven; for the Law holds, that it is better that ten guilty persons escape than that one innocent man should suffer.

"Fourth. To authorize the Jury to convict on circumstantial evidence, it must appear plain and manifest that the facts in evidence are not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion, and each fact necessary to the conclusion sought to be established, must be proved by competent evidence beyond a reasonable doubt. All the facts must be consistent with each other and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, and leading on the whole to a satisfactory conclusion which produces a reasonable and moral certainty that the prisoner, and no other, committed the offence charged, or that the prisoner aided, and abetted, and assisted in the commission of such offence.

"Fifth. Before the prisoner can be held accountable for the acts, threats or words of Freeland, or any other person, it must plainly and manifestly appear, by the evidence, that there was a common purpose, design or agreement between the parties, and it must also appear by the proof what that common design, purpose or agreement was, and that the common purpose, design or agreement was unlawful, and it must also appear that the prisoner was a party to the design, purpose or agreement, to which the words, acts or threats of Freeland, or such other persons related.

"Sixth. Before the prisoner can be held accountable for the acts of Freeland, or any other person, it must appear to the Jury by evidence (and of this as well as all other facts thereof, must be satisfied beyond a reasonable doubt,) that such acts were strictly in prosecution of the purpose for which the party assembled; for if three persons go out to commit a felony, and one of these, unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony, will not be guilty thereof, notwithstanding it happened whilst they were engaged with him in the felonious act for which they went out; and it is a question for the Jury whether the act done, was done in the prosecution of the purpose for which they assembled, or was independent and outside of such purpose, and without any previous concert.

"Seventh. That malice is a necessary ingredient of the crime of Murder."

The Court refused to charge the remainder of this seventh item of the request, to-wit:

"And where the circumstances of the killing, according to the evidence, are such as would raise a presumption of malice under the ninth section of the fourth division of the Penal Code, as to Homicide in the prosecution of a riotous intent, that that is a presumption of fact which may be rebutted or explained by proof, and if the Jury believe, from all the evidence in this case, that the prisoner was not in fact actuated by malice, then he is not guilty of Murder under that section of the Penal Code."

Eight. The Court resumed the charges, requested by the defendant's counsel, as follows:

"Where several persons are present at the killing of a man, they may be guilty of different degrees of Homicide, as one of Murder, and another of Manslaughter, but a person may be present, and if not aiding and abetting, be neither principal in the first or second degree, or accessory, as if A. be present at a murder and take no part in it, nor endeavor to prevent it or to apprehend the felon, this conduct, though highly criminal, will not, of itself, render him either principal or accessory."

"Ninth. To impeach a witness by showing that he has made contradictory statements, it is not necessary that he deny the declarations imputed to him. It may be done when he says he does not recollect, if the subject-matter of the conversations relative to the issue. If Jeremiah Freeland stated that he did not recollect having a certain conversation with Harde-man Bone, and it is shown by the proof that he did have the conversation, if the conversation is relevant to the issue, then he is successfully impeached." Here the Court added: "If the Jury shall believe that he testified falsely when he said that he did not recollect the conversation." The Court, resuming the request, charged also: "And if the conversation had reference to the distance that Jeremiah Freeland was from where the deceased came to his death, then the conversation was material to the issue."

"Tenth. Where a witness testifies falsely as to a leading fact, respecting which there could be no mistake or misapprehension by him, he is not entitled to any credit in any

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of his testimony. If it has been shown to the Jury that Joreemiah Freeland, at one time, testified that, during the time Isaac Freeland and deceased were engaged in fighting, William Braunon patted his father, Isaac Freeland, on the back, and, at another time, testified that it was Jacob Pettyjohn that patted Isaac Freeland on the back, the Court charges you that that is a leading fact.

"Eleventh. In a criminal case the Jury are the judges of the Law as well as the fact, and each juror is accountable for the verdict of the body; and if any one of the Jury should not be satisfied beyond a reasonable doubt of the guilt of the prisoner, they could not convict him," to which the Court added, "that the Jury could not render a verdict unless all agreed on the verdict," and then resumed the request to charge:

"Twelfth. It is not in every homicide, where the persons present aiding and abetting the actual perpetrator of the homicide are guilty of Murder. If a sudden fight spring up between two men and the spectators, or those standing around, encourage one party by hallooing hurrah, or otherwise, believing it to be a mere fight, and not knowing that the party they encourage is killing the other, and such party actually kills the other without the knowledge or concurrence of such spectators or by-standers, while it is Murder in the actual slayer, it would only be Involuntary Manslaughter in the commission of an unlawful act in such spectators. And if in this case the Jury believe that the Freeland crowd pursued the Buise crowd, to whip old William Buise, and that they passed Claiborn Vaughan in the road, and went up to William Buise, and that William Buise, after striking Isaac Freeland with a stick, ran off and the Freeland crowd pursued him until the object of the pursuit was either accomplished or frustrated, and that then the Freeland crowd turned round and started home, and Isaac Freeland got into a fight with Claiborn Vaughan, and that prisoner encouraged Freeland in the fight, believing and supposing that it was a mere fight, and not knowing that Freeland was killing Vaughan, then the prisoner is not guilty of Murder, but is guilty of Involuntary Manslaughter in the commission of an unlawful act."

When the presiding Judge had finished charging the requests of defendant's counsel, as aforesaid, without being

requested by either party, but stating it to be in explanation of the charges given at the request of counsel for defendant, and for the purpose of simplifying the same, he proceeded to charge the Jury, further, as follows:

"It is material that the Jury enquire, when and under what circumstances the deceased was killed. If he was not killed by Isaac Freeland, whilst Isaac Freeland and those with him were engaged in the prosecution of a riotous intent, but was killed in a sudden fight which occurred between him and Isaac Freeland, then the Court charges you that, although Freeland may have engaged in the fight, of malice and with intent to kill, and the prisoner, free from such malice and intent to kill, may have taken sides with Freeland, and encouraged him by words, yet he would not be guilty of Murder; in such a case, the prisoner would be guilty of Involuntary Manslaughter in the commission of an unlawful act. In trials of fact, the fact may be proved directly by those who speak from their own actual, personal knowledge of its existence; this is called direct or positive testimony. Or the fact to be proved, may be inferred from other facts satisfactorily proven: this is what is termed circumstantial evidence. A verdict may well be founded on circumstantial evidence alone, and circumstances often lead to a conclusion as satisfactory as direct evidence can produce. All the facts in this case, which are established before you by competent and satisfactory evidence, whether direct or circumstantial, it is your duty to find proved.

The Jury returned a verdict, finding the defendant guilty of Murder, as principal in the second degree. Counsel for the defendant then made a motion for a new trial in said case, on the following grounds:

1. Because the verdict of the Jury was contrary to law and evidence.
2. Because the verdict was strongly and decidedly against the weight of the evidence.
3. Because there was no evidence that the defendant aided and abetted in the killing of deceased.
4. Because there was no evidence that the defendant was present at all at the killing of deceased, except the evidence of Jeremiah Freeland, who was successfully impeached by other testimony.
5. Because there is no sufficient evidence of a combination

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or conspiracy among the pursuing party, for any common purpose or design; and if any common design was shown at all, it was a design different from killing or injuring deceased. On the contrary, the evidence showed that there was no common cause of quarrel between the two crowds, some of the members of each crowd being friendly, especially the defendant and deceased.

6. Because, if any common purpose or design was shown by the evidence, the evidence also showed that that common design or purpose was accomplished or frustrated before the deceased and Isaac Freeland had the fight which resulted in deceased's death, and that that difficulty was collateral to, and outside of the design; and the evidence does not show that the defendant aided and abetted Isaac Freeland in the fight with deceased, and if it did, it does not show that defendant knew that Freeland intended to kill, or was killing or stabbing deceased; and, in these particulars, the verdict is directly contrary to the charge of the Court.
7. Because the Court erred in admitting evidence about the quarreling and fighting at the Court Ground on the day of the killing, at night, counsel for the defendant objecting to such evidence.
8. Because the Court erred in this, to-wit: When the Solicitor General had examined Abraham Buise, a witness for the State, and was in the act of turning him over to the defendant's counsel, the Court requested the Solicitor General to ask the witness a question, in answer to which, the witness located the place from which the noise and words, &c., testified to by him, proceeded, which place was the spot where he left deceased in the road; to which request of the Court the Solicitor General replied that he had shown that by Wiley Vaughan; the Court repeated the request, and the Solicitor General asked the question, at the suggestion and request of the Court.
9. Because the Court erred in admitting in evidence the following statement of Abraham Buise, a witness for the State, to-wit: "I heard a noise as if some person was kicking or knocking him (meaning the deceased) in the back," counsel for defendant objecting to the mode of describing the noise.

10. Because the Court erred in refusing to charge as requested by the defendant's counsel: That where the circumstances of the killing, according to the evidence, are such as would raise a presumption of malice, under the 9th Section of the 4th Division of the Penal Code, as to homicide in the prosecution of a riotous intent, that it is a presumption of fact which may be explained by proof, and if the Jury believe from the evidence that the defendant was not, in fact, actuated by malice, then he is not guilty of Murder under that section of the Code.
11. Because the Court erred in reading to the Jury the definition of a riot from the Penal Code, and charging the Jury in explanation of riotous intent under the 9th Section of the 4th Division of the Code, as follows: "Riotous intent means an intent to do an unlawful act of violence, or any other act, in a violent and tumultuous manner, in which intent two or more persons must be joined," said charge having no application to this case; and because the whole charge of the Court, except that portion given at the request of defendant's counsel, was contrary to Law.

The presiding Judge overruled the motion and refused a new trial, and defendant's counsel excepted.

Counsel for defendant then moved the Court to commute the punishment of the defendant from death to that of perpetual Penitentiary confinement, which the Court refused to do, remarking at the same time, that he would gladly do so, if the circumstances of the case would admit of it, but believing that this was not such a case of circumstantial evidence *alone* as was contemplated by the Statute, he felt constrained to refuse to commute the punishment; the defendant's counsel excepted.

The presiding Judge then passed sentence upon the prisoner, directing his execution to be done "publicly," and at the place of "public" execution; and defendant's counsel excepted.

These rulings of the Court, refusing a new trial; refusing a commutation of the defendant's punishment, and in directing his execution to be "public," constitute the errors as signed in this case.

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J. R. BROWN and H. P. BELL, for plaintiffs, in error.

WM. PHILIPS, Solicitor General, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We do not deem it necessary or proper to discuss, separately and at length, all the grounds taken in this writ of error.

The defendant has been tried and convicted as principal, in the second degree, for the murder of Claiborn Vaughan, one Isaac Freeland having been condemned and executed as the actual perpetrator of the deed.

To better understand the questions of Law in the case, it is well to consider, first, whether the verdict is contrary to the evidence. I will state the testimony briefly, omitting all minor facts and circumstances which do not materially affect the case :

In August, 1858, there was a gathering in Forsyth county, at a place called Wild-Cat Court Ground. Amongst the crowd, thus assembled, there appears to have been some half dozen South Carolinians, and they constituted, what is called in the evidence, the Buise Crowd. The accused belonged to what was designated as the Freeland Crowd. Claiborn Vaughan, the man killed, was a South Carolinian. The defendant and one Abraham Buise had had a fight late that evening, in which McGinnis got the best of it. Indeed his whole conduct, on that occasion, was that of the bravado and the bully; and notwithstanding Isaac Freeland acted a more prominent part than McGinnis in the subsequent scene of the tragedy, yet it was not so in the beginning, for at the Court Ground, and up to the time of the departure of the Buise party, the conduct of Isaac Freeland was rather that of a peace-maker than otherwise.

It is important to ascertain the feelings of McGinnis toward the Buise crowd. For although there appears to have been no personal ill-will entertained by him toward Claiborn Vaughan, still the proof demonstrates that his hostility extended to the whole of that crowd. In the course of the altercations and scuffles between Abraham Buise and himself, it was agreed that they should drink together and drop their quarrels; and yet, while in the act of drinking, McGinnis continued to repeat, "drink your damned Carolina liquor;"

and this is the first development of the enmity toward that party, as such. Again: when Abraham Buise refused another fight with him, and was about leaving, McGinnis said, "if you don't leave I will kill the last damned South Carolinian that is of you." Here the spirit of the partizan had got the mastery over all personal likes and dislikes; and this is no new phase of human nature—with all associations it is enacted daily before our eyes. The Democrat and the American will each forget, in a day, the friendship of a long lifetime, so soon as his party blood is boiling. After such a declaration or threat as that just quoted, it is needless to invoke the former difficulties between McGinnis and some of the Freeland crowd, or the kindly relations which had subsisted, down to the morning of that fatal day, between himself and Claiborn Vaughan.

The Buise party left, all in the right direction for their respective homes. Abraham Buise turned out of the main road to a spring to get a drink of water, while these, McGinnis and the opposite party, started in the same direction, but going directly from their respective homes. They began to curse the Buise party, telling them "they had better go home, for that they were *all* run from their county for stealing or forgery, or some other damned meanness." Old man Buise replied to McGinnis, "that he was a damned old Penitentiary convict." And from this response, we gather that McGinnis was the spokesman and leader of his gang.

The Buise crowd proceeded some seventy-five or one hundred yards and halted, one of them returning to get the shot-bag he had left at the spring, and old man Buise's bridle. The Freeland crowd went back to the Court Ground. Soon they were observed coming back with a torch-light, shouting and singing like drunken men: "Walk, Tom Walker, walk away, we'll make the damned South Carolinians walk away." The Buise party set off and got some quarter of a mile ahead. The pursuing party, after momentarily halting, some forty yards distant, approached them rapidly. One of the witnesses testifies that it was McGinnis who exhibited a wound upon his head and asked several if they had stricken him. But the weight of the evidence is, that it was Isaac Freeland who made this inquiry. When Isaac Freeland interrogated old Wm. Buise about the matter, he struck him one or two blows with his stick, when he, and most of his crowd, fled and concealed themselves.

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The pursuing party had passed Claiborn Vaughan upon his horse in the road, and after the affair between Isaac Freeland and Wm. Buise, the former returned to where Claiborn Vaughan was, and addressing him as *Wiley* Vaughan—who was in the company—he said: “Is this Wiley Vaughan, the rascal who struck me with a stick?” Claiborn Vaughan replied: “I am not Wiley Vaughan, but Claiborn Vaughan.” Isaac Freeland said: “You are a damned South Carolinian, and with that crowd.” Claiborn Vaughan answered: “I am a South Carolinian, and with that crowd, but took no part in their fighting scrape.” Isaac Freeland retorted: “We take in all South Carolinians,” or “it is South Carolina blood we are after.” Both expressions may have been used.

And now the fatal catastrophe ensued; Claiborn Vaughan was stricken down; whether he was dismounted at the time, or was knocked off his horse, is not certain. And now the shout of encouragement was heard: “hurrah, Freeland! hurrah, Freeland!” Claiborn Vaughan cried: “Boys, I’m murdered.” Next, “murder, murder,” the last wail in a choking voice, as his life-blood was fast ebbing out to glut the vengeance of an infuriate mob! Isaac Freeland, with a callousness without a parallel, said: “are you dead, God damn you, old man,” or “old fellow!” McGinnis was there all this time.

After Isaac Freeland had left his victim, McGinnis being near, some noise was heard like scuffling or, as one of the witnesses described it, as if some one was knocking or kicking the body of another. When McGinnis joined his crowd, and the question was asked if there was not some fighting back there where Claiborn Vaughan was murdered, he replied, “no, there was nothing wrong,” or “nothing the matter.” The last sight seen of Claiborn Vaughan that night, he was on his all-fours.

For the sake of our common humanity, I shall assume, in this opinion, although there is strong testimony to the contrary, that after the brutal butchery of the unoffending man, by Isaac Freeland, that no more violence was inflicted upon his person. He was stabbed in thirteen places; the jugular vein being almost cut asunder, and done, probably, with the knife of Isaac Freeland, while his helpless and imploring victim was prostrate on his back, and his butcher

a-straddle of him. The wounds upon the body of the deceased, as well as the blood upon the pantaloons of Isaac Freeland, justify the foregoing supposition. There could be no motive for stamping one even thus pierced and hacked to pieces, except as we would a slaughtered swine or beef-cattle, to drain the last drop of blood from the body.

So much for the evidence in this case. In the opinion of this Court, it fully authorized the finding of the Jury, that the defendant was present aiding and abetting in this horrible homicide. If it be asked what motive had McGinnis in aiding and abetting in killing Claiborn Vaughan, I reply, what motive had Isaac Freeland for killing him? Did the Court err in the administration of the law in this case?

1. It is assigned as error, that the Court admitted evidence of the quarreling and fighting at the Court Ground on the day preceding the killing.

The answer to this complaint is twofold: In the first place, it was necessary to let in this proof in order to understand the state of feeling which actuated the various persons who were engaged in this transaction, and which finally separated them into two distinct crowds. Testimony had already been admitted, not only to show the absence of any bad feeling on the part of McGinnis toward Claiborn Vaughan, but also to establish that difficulties had previously existed between McGinnis, Freeland and others on that side, and which continued down to the day of the homicide. It was right and proper, then, to prove how all these previous relations had been merged and forgotten, as manifested by the occurrences of that day, and how new combinations had, for the time at least, taken their places.

But, secondly, from the first difficulty between McGinnis and Abraham Buise, until the curtain fell over the gory corpse of Claiborn Vaughan, it was one continuous controversy, smothered awhile, occasionally, and then breaking out with renewed violence, and spreading and enlarging at every recurrence, until the Savannah River became the line of division between the parties.

2. It is assigned as error, that, by the direction of the Court, the Solicitor General was compelled to ask the witness, Abraham Buise, a question. We have already held that it is not wrong for the presiding Judge himself to interrogate the witnesses. It is not only his privilege to do this, but, we

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apprehend, his duty likewise, whenever he desires to ascertain a fact with a view to the correct administration of the Law. If the Judge himself may propound questions for the purpose of eliciting the truth upon any given point, he may direct the State's officer to do so.

3. As to objection to the testimony of Abraham Buise, that, after Isaac Freeland had left the deceased, when McGinnis lingered behind, he heard, from his retreat by the roadside, to which he had fled, "a noise like some one was kicking or knocking Claiborn Vaughan," what was there wrong in that? It is argued that the illustration was too personal in its application. It was just what it should have been. The witness may have been mistaken. It was for the Jury to judge of that.

4. There is but a single ground taken in the motion for a new trial that has any apparent merit in it, and that, we think, is founded in a total misapprehension of the true meaning of the 9th Section of the 4th Division of the Penal Code. It is the section which treats of *involuntary* Manslaughter. It declares that "Involuntary Manslaughter shall consist in the killing of a human being without any intention to do so; but in the commission of an unlawful act or a lawful act which probably might produce such a consequence, in an unlawful manner." And then follows this important qualification: "Provided, *always*, that where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, *or is committed in the prosecution of a riotous intent*, or of a crime punishable by death or confinement in the Penitentiary, *the offence shall be deemed and adjudged to be Murder.*"

The charge requested was, that the presumption of malice, arising from the circumstances to which this section refers, was a fact, and one which might be rebutted by proof.

Such is not our interpretation of the Code. Whenever the life of a human being is destroyed, under the state of facts contemplated by this section, the offence shall be deemed Murder, and such is the judgment which the Law pronounces upon it. Suppose the life of a human being is destroyed where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart, is not the offence Murder? And is not

this the stern judgment of the Statute, wholly irrespective of the past or present relations subsisting between the slayer and the slain? If I discharge a loaded gun or pistol at a crowd and kill my best friend, is not this Murder? Who ever doubted it? Just so where the killing is committed in the prosecution of a *riotous intent*.

If two or more persons assemble in some public place, and having prepared a balloon, seize and fasten to it the first passer-by and cause it to ascend for the amusement of the multitude, and by some casualty death ensues, is it any defence to allege and prove that the rioters were not actuated by any personal ill-will toward the victim of their reckless sport? On the contrary, the Code declares that each and every one concerned shall be guilty of the crime of Murder, and, upon conviction, shall be hung by the neck till they are dead. It refuses to show pity to those who were deaf to the appeals for mercy and the tortures and sufferings and dying agonies of others.

The instructions of the Court were far more favorable to the prisoner than he was entitled to under the Law. The riotous intent of this Freeland crowd, to perpetrate an unlawful act, was fully and satisfactorily established. What their precise purpose was we are left to conjecture. Perhaps they had no very definite plan themselves. It was to chase away and beat, or otherwise maltreat the South Carolinians, and to use their own dialect, to take their blood—and most wantonly and wickedly did. They imbrued their hands in the life-blood of an unoffending man. I say their hands, for the hand of one was the hand of each and all. It is immaterial who inflicted the mortal wounds. The rest were standing around hurraing their comrade, and by their presence frightening off and keeping away the friends of the deceased, who might, but for them, have come to his rescue. All are, in the eye of the Law, equally guilty, and all are like punishable.

We concur with the Court, that this conviction was not founded upon circumstantial evidence, and that he had no discretion as to the mode of punishment.

The execution, we hold, should have been under the Act of 1859.

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JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed, except as to the public execution of the prisoner.

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1. An application for a certificate, to prevent damages being assessed under the Act of 1815, creating the Supreme Court, must be made during the Term at which the Judgment was rendered.
- 2 The party may apply in advance of the decision, and the proper time for doing this is when the case is argued.

Trover, in Coweta Superior Court. Decided by Judge BULL. at the September Term, 1859.

On the 14th of August, 1849, Napoleon B. Goodwyn instituted an action of Trover against Nancy Goodwyn, to recover damages for the alleged conversion of twelve negro slaves, and on the final trial of said case—on the 10th of March, 1859—the Jury returned a verdict in favor of the plaintiff for ten thousand dollars, to be discharged by the delivery of the negroes in dispute, within thirty days, and also the sum of two thousand dollars for the hire of said slaves.

Nancy Goodwyn filed her bond, with security, for the purpose of suspending the execution of said Judgment, and carried said case to the Supreme Court, and upon the hearing, the Judgment of the Court below was affirmed by the Supreme Court.

Neither of the Judges of the Supreme Court were applied to, or gave any certificate during the Term at which the case was heard and determined, as to whether, in their opinion, the said case was carried up by Nancy Goodwyn for delay, but after the Judges had gone home, two of them, to-wit: Judges Lumpkin and Benning, certified that, in their opinion, the case was not carried up for delay.

Under this state of facts, the counsel for Napoleon B. Goodwyn, at the September Term, 1859, of Coweta Superior Court, moved to make the Judgment of the Supreme Court the Judgment of the said Superior Court, and also for leave to sign up Judgment against the said Nancy Goodwyn and her securities for the amount of said Judgment, and ten per cent. damages on the principal sum, for delay in taking up the case as aforesaid.

This motion was resisted by counsel for Nancy Goodwyn on two grounds:

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1. Because the Judgment was founded on a verdict in an action of Trover, which verdict was in the alternative, and was not for such a sum certain and fixed, within the meaning of the Law, as allowed damages to be given.
2. Because two of the Judges of the Supreme Court had certified, as herein before stated, and their certificates were presented to the Court.

The presiding Judge granted the motion of Napoleon B. Goodwyn's counsel, and gave Judgment accordingly, and this decision is the error assigned in this case.

POWELL, for the plaintiff in error.

BUCHANAN, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

By the 5th Section of the Act of 1845, organizing this Court, it is provided that: "If the decision and Judgment of the Court below be for a sum certain, and be affirmed in the Supreme Court, the plaintiff may, in the Superior Court, enter Judgment against the defendant and his securities for the amount of principal, interest and cost, as shall be confessed or found by the Jury, and ten per cent. damages on the principal sum, and have execution immediately after the decision of the Supreme Court, so certified as aforesaid: Provided, that, if any one or more of the Judges of the Supreme Court shall certify that, in his or their opinion, such cause was not taken up for delay only, then, and in such cases, the damages shall not be allowed."

In the case of Andrew Turner against William Collins. (8 *Geo. Rep.*, 436) this Court held, that application for the certificate must be made during the Term at which the decision was rendered. That decision must control this case.

We do not feel called upon to review the grounds for the construction thus early put upon the Statute. The decision itself, must stand for a reason, until changed by the Legislature.

As counsel are frequently compelled to leave the Court before the Judgment is rendered, it would be a wise precaution to apply in advance for the certificate, as, for instance, when the case is argued, in case the Judgment is adverse.

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JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

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Where a Judgment at Law is had in an action of Trover, for negroes, by one who has not the true title, and afterwards administration is taken upon the estate of a deceased person in whom is the true title, and both the plaintiff and defendant, in first suit, are—without the subject of the suit—unable to respond to a recovery, a Court in Equity, upon the application of the administrator of the true owner of the property, will enjoin both plaintiff and defendant, in the Trover suit, from the settlement and enforcement of the Judgment—not only for the protection of the property from loss, but to protect the defendant in the first suit from two separate demands for the same subject.

In Equity, in Coweta Superior Court. Decision by Judge BULL, at chambers, on the 28th of September, 1859.

John M. Sims, as the temporary administrator of Burwell Goodwyn, deceased, prepared and verified his Bill in Equity in due form, in which he alleged the facts following, to-wit:

That, some time in the year 1835 Burwell Goodwyn died intestate, in the county of Brunswick and State of Virginia; that, at the time of his death, and for several years previous to that time, the said Burwell Goodwyn was seized and possessed, as of his own just right and property, of three negro slaves, to-wit: Winney, a woman of dark complexion, Caroline, a woman of yellow complexion, and Harriet, a woman of yellow complexion; that said Winney had given birth to Ned, a boy of dark complexion, Julia, a girl, and Anthony, a boy; that said Caroline had given birth to a girl-child, named Martha, of yellow complexion, and that said Harriet

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had given birth to a boy-child by the name of Joe, and one by the name of Albert, and a girl by the name of Catharine, and one by the name of Caroline, and three infant children whose names were unknown to the complainant; that, at the time of drafting said bill, Winney was about fifty-five years old—the first-named Caroline was dead—Harriet was about thirty years old—Ned was about twenty years old—Julia was about eighteen years old—Anthony was about twelve years old—the second-named Caroline was about three years old—Martha was about twelve years old—Joe was about eleven years old—Albert was about eight years old—Catharine was about six years old, and the ages of the said three infant children unknown to the complainant; that said negro slaves were of the aggregate value of eight thousand four hundred dollars, and of the aggregate annual value for hire of four hundred and thirty-one dollars; that said Burwell Goodwyn, at the time of his death, was considerably in debt, and no administration was ever taken out on his estate, for the reason that the distributees and heirs at Law of said estate were willing that Mrs. Nancy Goodwyn, the widow of said deceased, should keep the possession of said negroes, and use and control the same for the purpose of raising, maintaining and educating the children of the said Burwell Goodwyn, deceased; that the said negroes first mentioned, and their subsequent increase, were and have been kept, used and controlled by the said Nancy Goodwyn from the death of said deceased up to the time of drafting said bill, for the purpose of raising and educating the children of deceased, as aforesaid, and that the said negroes were then hired out by the said Nancy Goodwyn to various persons in said county of Coweta, and constituted nearly all the means of support for her in her old age—being then an aged lady: that, in the year of 1849, Napoleon B. Goodwyn commenced his action of Trover, in Coweta Superior Court, against the said Nancy Goodwyn, for all of said negroes then in existence, and, by an amendment of his Writ, had included all of their subsequent increase, except the infant child of Harriet; that said action of Trover had been litigated with varied success up to the March Term, 1859, of said Court, when the said Napoleon B. Goodwyn obtained a verdict for the sum of eight thousand dollars damage, to be discharged by the delivery in twenty days of all of said negroes, except

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Caroline, who was then dead, and the infant child of Harriet, born since, and also for the sum of two thousand dollars, for the hire of said negroes; that said Nancy Goodwyn sued out a Writ of Error to the Supreme Court of said State of Georgia, giving bond and security, in order to supercede the execution of the judgment signed up on said verdict, and that, on the hearing of the case carried up by said Writ of Error, the said judgment was affirmed by the said Supreme Court; that a motion was then pending, and would be pressed, to make the said Judgment of the Supreme Court the Judgment of the said Superior Court; that, if said motion was pressed and granted, the said Nancy Goodwyn would, unless restrained, turn over to said Napoleon B. Goodwyn all of said negroes in discharge of said verdict, and also pay off said verdict and judgment for hire; that, notwithstanding said verdict, said negroes were then, at the time of drafting said bill, the just right and property of the estate of said deceased; that complainant cannot, within the time allowed by said verdict for the delivery of said negroes, obtain permanent letters of administration on the estate of said deceased, so as to prosecute the rights and protect the interests of said estate; that, if said negroes should be delivered over to the said Napoleon B. Goodwyn, he had threatened to and would run them off, and remove himself out of the limits of the State of Georgia, and beyond the jurisdiction of her Courts, before the complainant could, according to Law, obtain permanent letters of administration so as to prevent the same by an action at Law; that said Napoleon B. Goodwyn is wholly and entirely insolvent, and much in debt, and there are judgments whose liens would attach upon said negro slaves and thus involve said estate in trouble and expense, and make it more difficult to obtain the right thereof, relative to said property; that the complainant applied for and duly obtained temporary letters of administration on said estate on the 12th of September, 1859, which were exhibited to said bill.

The complainant sought, by the prayer of said bill, a discovery of the facts charged from the said Nancy Goodwyn and Napoleon B. Goodwyn; also, that the said Napoleon B. Goodwyn be enjoined from enforcing said verdict and judgment; also, that all of said negroes be, by a decree of the Court, delivered up to such permanent administrator of said

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estate as may be appointed, and that two thousand dollars hire, and the hire subsequently accruing, be likewise, by a decree of the Court, paid to such permanent administrator; and, also, for general relief.

This bill was presented to Judge Bull, of the Coweta Circuit, (Judge Hammond being at the time absent from the said Talapoosa Circuit) for his sanction and a fiat for the injunction prayed for in the bill.

Judge Bull withheld his sanction and refused the injunction, and that ruling is the error complained of in this case.

POWELL, SIMS & B. H. HILL, for the plaintiff in error.

BUCHANAN, for the defendants in error.

By the Court.—LYON, J., delivering the opinion.

Napoleon B. Goodwyn, one of the defendants, commenced an action of Trover, in Coweta Superior Court, against Nancy Goodwyn, the other defendant and his mother, for the recovery of certain negroes, and after much litigation, succeeded in recovering judgment against her for the value of said negroes and their hire, amounting, in the aggregate, to the sum of ten thousand dollars, eight thousand of which could be discharged by the delivery of the negroes.

By reference to the report of that case in 20 *Geo.*, 420, and 29 *Geo.*, 225, where all the facts and grounds of that recovery are represented at large, it will be seen that the title of Napoleon B. rested on the following facts: The negroes, or those from which these now in controversy sprung, were levied and sold at Sheriff's sale, in the State of Virginia, on the 6th of May, 1829, as the property of Burwell P. Goodwyn, the husband of one and father of the other of defendants, when they were bid off by one Oliver, for the defendant in execution, Burwell P. Goodwyn, who paid the price at which they were sold at that sale. The possession of the negroes were unchanged, but, for some purpose, a title for the negroes was made to Mrs. Elizabeth Goodwyn, the mother of Burwell P., and in 1830, she, by her Will, bequeathed them to her grand-son, Napoleon B.—she never having had possession of them, but the negroes continued in Burwell Goodwyn's possession up to his death, in 1835.

There was no administration had upon his estate, for he seems to have been very much embarrassed and wholly insolvent. After the death of Burwell, the negroes continued in the possession of his widow, Mrs. Nancy Goodwyn, who, sometime afterwards, removed with the negroes and her children to Coweta county, Georgia, where that suit was brought, in 1849. Upon these facts, this Court ruled—the question being directly presented—that, “if Burwell P. Goodwyn’s money paid for the negroes, Mrs. Elizabeth Goodwyn, not having got possession of the negroes, never could have recovered them from him during her life-time, neither could she will them after her death so as to enable her legatee to do so.” 20 *Geo.*, 621. Notwithstanding this ruling, the plaintiff in that action succeeded in a recovery, not on the strength of his title, but in consequence of the admissions of his mother, the defendant in that action. As against her, he is entitled to the possession of the negroes and an account for the hire, so it is adjudicated. But at that stage of the proceeding, and before that judgment is executed, administration is taken out on the estate of Burwell P. Goodwyn by the complainant, who, it seems, is the security on the bail bond, given by Mrs. Goodwyn upon the demand of her son, and, consequently, is liable for this sum of money so recovered. And he files this bill, asking the Court to enjoin the collection or settlement, alleging, among other things, that, if the negroes should go into the possession of Napoleon in settlement of that judgment, that the property would be run off, or squandered, or seized by his creditors, and new issues, and new litigation would be the consequence: that he, Napoleon, is wholly insolvent and utterly unable to respond to any recovery that might be had against him in this behalf. That, if Nancy Goodwyn be allowed to settle this judgment with this property, it would take all she had to pay it, and she would be unable to respond to a recovery, &c. Upon these facts, we think, the complainant is entitled to the injunction, for by the injunction complainant is fully protected and indemnified against any loss from a change of the property, to which, according to the allegations in the bill, it would be greatly exposed, and for the additional reason that the complainant is entitled to a recovery of the property, and the injunction should be allowed, for the purpose of protecting the defendant. Nancy Good-

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wyn, who is also before the Court by this bill, and as much entitled to relief as if she had solicited it; for it would be grossly inequitable and unjust to compel her to pay this judgment and, also, answer to the demand of the complainant for the identical property—for to that demand she is clearly liable—and a Court of Equity ought not to permit her to respond for the same property or cause of action but once.

It is objected to the grant of this injunction by the defendant, Napoleon B., that the demand of complainant is stale. It certainly cannot be so as to him; for he never has had the possession of the property, so that the Statute of Limitations could run as against him. And that is a sufficient reply to that objection.

It is also said that the Common Law remedy of the complainant is adequate and complete, but it is not so, on account of the insolvency of Napoleon B.; besides, no action can be had against him until he gets the property, and when he does that, it is perfectly possible that the process of the Court could neither reach him or the property. That's the case made in the bill. Nor would any Common Law remedy, even if Napoleon B. was responsible and solvent, fully meet and protect the rights of all the parties in interest. The complainant might possibly be protected, if Mrs. Nancy Goodwyn could respond to both actions, and a recovery in each: but this she is not able to do, and if she could, it would be inequitable to so compel her.

The injunction must be allowed on complainant giving the bond required by the Statute.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in refusing to sanction the injunction prayed for in this bill. On condition that complainant gave the bond required by the Statute in such case, the injunction should have been granted.

THE GEORGIA MILITARY INSTITUTE vs. SIMPSON.

1. The Georgia Military Institute cannot be made chargeable through its Board of Trustees, when a contract, made with the Board of Visitors, the latter acting under a special delegation of power from the State, within the scope of their authority.
2. Is the Georgia Military Institute sueable at all? Query.

Complaint, in the Superior Court of Cobb county. Tried before Judge RICE, at the March Term, 1860.

On the 22d day of May, 1858, Leonard A. Simpson contracted and agreed with the Board of Visitors of the Georgia Military Institute, to construct and finish a building on the premises of said Institute, for the sum of forty-two hundred and fifty dollars. The building was to be constructed and finished by a specified time, and in accordance with certain prescribed specifications. The second and last items in the specifications are as follows, to-wit:

“Bed of foundation, every part of it, to be two feet below the surface of the ground. The foundation to be three bricks thick, to be laid with hard burnt bricks, in hydraulic mortar, and each course well grouted as high as one foot above the surface of the ground, or to the bottom of the joists of the first floor.

“The contractor to do such extra work as he may be called upon to do, and to receive pay therefor at the current price of such work in the town of Marietta.”

The said Simpson employed Wallace and Eaves to do the brick-work of said building, and there were used in the building, about thirty thousand more bricks than the estimate which Wallace made. Simpson bid for, and took the contract, with a knowledge of the ground on which the building was to be located, and Wallace made his estimate of the number of bricks which would be required in the building, with the specifications before him.

The ground or site of the building being an inclined plane, said Simpson, instead of making off-sets, which he might have done, dug down the higher part of the ground and laid the foundation deeper so as to make it level with the lower portion of the ground: and in doing this, and building steps

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to the building, the extra bricks and work were used and done. Wallace and Eaves were of opinion that the extra work was necessary to make the building a complete and a good job. The Board of Visitors requested Col. Brumby and Captain McConnell to superintend the construction of the work, so far as to see that the contract was carried out, and the work done well. Colonel Brumby did not call upon said Simpson to do any of the extra work sued for, except the steps, and a black-board. Nor does it appear from the evidence that Captain McConnell, or any one else, ever gave directions for said work to be done, although McConnell was frequently standing about and superintending, or looking at the work whilst it was progressing. Simpson received forty-two hundred and fifty dollars for said building, from the Board of Visitors, and the building was received by the Board of Visitors. Simpson gave a bond, payable to His Excellency, Joseph E. Brown, Governor of the State of Georgia, for the faithful performance of the contract.

Under this state of facts Simpson brought suite against the Georgia Military Institute, to recover three hundred and forty-eight dollars and forty-one cents, for 33,232 bricks, laid in hydraulic mortar; 1,667 bricks in the steps; setting stone steps; steps and hand-railing to lower door; scuttle-hole in the roof; and a black-board for the upper room.

When the testimony (which consisted of the facts herein before detailed) had closed, counsel for the defendant moved a non-suit against the plaintiff, on the following grounds, to-wit:

1. Because the defendant was not liable to be sued in said action.
2. Because the proofs submitted by the plaintiff showed no contract entered into by the defendant, for the work sued for in said case, nor any liability on the part of the defendant to pay for the same; the contract proven having been made by, and with the Board of Visitors, who had no power to bind said Institute.

This motion was overruled by the Court, and counsel for the defendant excepted.

Counsel for the defendant then requested the presiding Judge to charge the Jury, "That if the plaintiff undertook and contracted to do a certain job of work, in a particular manner,*and in accordance with certain specifications, and

for a particular sum of money, and it required more material than the plaintiff anticipated, to do the work in conformity with the contract and specifications, then the plaintiff is not entitled to recover for such excess of work or material."

This charge was given by the Court; but, in addition thereto, the Court charged the Jury as follows: "The plaintiff insists that the work for which he claims pay in this action, was extra work; that is, that it was work done in the construction of a building, outside of, or beyond his contract. If the Jury believe, from the evidence, that the plaintiff contracted to construct the building according to certain specifications furnished him, and that the plaintiff did do work, in the foundation of the building, beyond what was mentioned in the specifications, and that the work so done was necessary to make the building a good and complete building, and that without such additional work in the foundation the building would not have been a good, secure, and complete building, then the work so done is to be regarded as extra work, and for that work, and for the material furnished in doing it, the plaintiff is entitled to recover what the same is proven to have been reasonably worth."

To this additional charge counsel for the defendant excepted.

The Jury returned a verdict in favor of the plaintiff for three hundred and forty-eight dollars and forty-one cents, and defendant excepted.

The errors complained of in this case are:

1. The refusal of the Court to non-suit the plaintiff.
2. The qualification or addition made to the charge requested by defendant's counsel.
3. The verdict of the Jury as being contrary to evidence, the weight of evidence, and without evidence to support it.

IRWIN & LESTER and HANSELL, for the plaintiff in error.

SIMPSON & BLECKLEY, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

The character of the Georgia Military Institute is some-

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what amphibious. It was originally a private corporation. It was purchased by the State in 1857, and it is difficult to determine, now, what is its true character. It is pure public corporation, bought with the funds of the State, under its exclusive management and control. It has Boards—a Board of Trustees and a Board of Visitors—it is no easy matter to distinguish between the functions of the two. Some acts are performed jointly by both Boards.

By the 4th section of the Act of 1857, it is declared: "There shall be a Board of Trustees, who shall exercise the powers and faculties usually exercised by Trustees of Colleges." Does this subject the State, through this corporation, to be sued? We think not. Special power is given to sue the Central Bank and the State Road. There is no such authority conferred as to this Institution.

The suit was brought, in this case, against the Georgia Military Institute, and the Trustees only were served. It is clear that this proceeding cannot be sustained. The contract out of which this action originated was made with the Board of Visitors, and not the Trustees.

By the 3d section of the Act of 1857, (*Pamphlet, p. 1*) the Board of Visitors are authorized and directed "to examine the Institute grounds and determine on the improvements necessary and proper for the objects contemplated by the Act, viz: To provide, by Law, for the Military education and training of the youth of the State—contract for, superintend the execution thereof; and as they are contracted, and at different stages of their progress, to call for a part or parts of the appropriation, made by the Act, for this purpose, as shall be required for the payment of the same. And, in no case, shall an advance payment be made without ample security that the money shall be appropriated to the work; also, that the same Board of Visitors be paid a reasonable compensation for their service." &c.

The sum of \$7,000 was appropriated for the purchase of the property, and the like sum for the improvements provided for in the section just quoted.

Thus, it will be seen, that the duty of making the necessary additions and improvements was expressly delegated to the Board of Visitors, as the special Agents of the State, and that whatever other persons might belong to the Board of Trustees, that Board had nothing to do with this business.

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ness. They were not only incapable of binding the Institute, but were wholly irresponsible to the contractor respecting it.

Under the authority of the Act, a contract was made with defendant, by the Board of Visitors, according to specifications. And it is in proof that the job could have been done pursuant to the specifications, but it is also in testimony, to make it complete, additional work and materials were necessary; and it is for the extra work and materials—30,000 brick and the laying of them—that this action is brought.

It is insisted by the defendant in error, that Major Brumby and Captain McConnell were appointed by the Board of Visitors to superintend this work; that they witnessed its daily progress, and made no objections, although it is conceded they gave no positive consent about the matter. It is not denied but that they were requested to interfere so far as to see that the work was properly executed under the contract, but they disclaim any authority to bind the Board beyond that.

It is manifest, then, that the Georgia Military Institute, if suable at all, which we very much doubt, cannot be made chargeable through the Board of Trustees, in this action. It is equally plain that the Board of Trustees have incurred no personal liability, acting—as they did—as the agents of the State, and within the scope of their authority. Nor can we comprehend very clearly how the Institute could be made chargeable through the Board of Visitors, upon this contract. Mr. Simpson made his estimates as though the site was a plane, where it is an inclined plane. Hence the necessity of digging the foundation deeper upon the upper side, to horizontalize the foundation, or bring it to a level. By resorting to off-sets, this could have been avoided, and the house built within the estimates. But the building would have been less secure and complete.

The appeal, therefore, for compensation must be to the Public authority, and not to the Courts. We have no Court of Claims in this State, nor petition of right, as in England. But whoever contracts with the State trusts to the good faith of the State, unless the State sees fit to disrobe itself of its sovereignty, as it has done in the Law instance cited, to-wit: *The Central Bank and the State Road.*

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JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in not awarding a non-suit in this case.

MOORE vs. COULTER.

When lands of the United States in the State of Alabama are entered, and paid for to the officers appointed by Law for that purpose, the certificate given by the receiver to the purchaser, although no patent appears to have issued, is sufficient evidence of title to the land therein named in the holder, to enable him to sue for, recover and hold such land under the same, according to the laws of force in that State.

Complaint, in Floyd Superior Court. Tried before Judge HAMMOND, at the July Term, 1860.

Alfred B. Coulter instituted an action in the Superior Court of Floyd county against John Moore, founded upon the following instrument, to-wit:

"State of Georgia, Floyd county: Six months after date, I promise to pay Alfred B. Coulter, or bearer, two thousand dollars for value received, which may be discharged by making, and executing and delivering to said Coulter, or bearer, good warranty titles, with the patent grant and a full chain of title from the State of Alabama, and under the Laws thereof, for the following land, to-wit: For the East-half of the North-West quarter of section number thirty-three fl, in township number ten, of range number eleven, containing eighty acres; and for the West-half of the North-East quarter of section number thirty-three fl, in township number ten, of range number eleven, containing eighty acres, making one

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hundred and sixty acres, said land lying and being in Cherokee county, State of Alabama. Given under my hand and seal, February 10th, 1857. (Signed) JOHN MOORE."

On the trial of said case, the plaintiff introduced the said instrument sued on and closed his evidence.

The defendant introduced in evidence the receipts of Peter J. Walker, receiver, dated 22d of October, 1851, showing that Alfred E. Moore had paid in full for the lands mentioned in the instrument sued on.

These receipts or certificates were, on the 9th of November, 1854, transferred by Alfred E. Moore to John Culberson; and on the 10th of November, 1855, they were transferred by John Culberson to Nathan Moore.

The defendant also proved: That, on the first Tuesday in April or May, 1857, a conversation occurred between the parties, in which the defendant told the plaintiff that Nathan Moore was then present and would make a title to said land, and that the plaintiff replied, that he did not want the title then—that he wanted the defendant to sell or swap said land for him, the plaintiff, to one Summerhill, and that he, plaintiff, would give the defendant fifty dollars to make the trade; that afterwards, in October, 1857, the plaintiff told the defendant that he did not want him to make the trade about the land with Summerhill; that defendant was an illiterate man, and could write but very little, and that the body of the instrument sued on is in the hand-writing of the plaintiff.

The defendant, also, introduced in evidence, and tendered to the plaintiff in discharge of the obligations of the instrument a deed, duly executed and proven, made by Alfred E. Moore, conveying the land to the defendant, John Moore, and also a deed from John Moore and his wife, Harriet Moore, also duly executed and proven, conveying the land to the plaintiff, Alfred B. Coulter. The first deed dated first day of December, 1857, and the second deed dated the 12th of January, 1859.

It was admitted on the trial that no patent had ever issued for the land.

The testimony being closed, the Jury returned a verdict in favor of the defendant.

Counsel for the plaintiff then moved for a new trial on the following grounds, to-wit:

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1. Because the verdict is contrary to evidence.
2. Because the verdict is contrary to Law.
3. Because the Court erred in charging the Jury: That an offer to make a title, by defendant, to the land, and plaintiff's waiving it at the time, would authorize the Jury to presume that the defendant was able, or could make a good title in compliance with his obligation.
4. Because the Court erred in charging the Jury: That the certificates of entry were evidence of title in defendant, as to him individually, but was not sufficient protection against Government claims, they having been objected to as evidence of title in defendant.
5. Because the verdict of the Jury was contrary to the following charge of the Court, to-wit: "That, although the plaintiff may have waived making title at any time, it was necessary for the defendant to show that, before rendition of judgment on the instrument sued on, he did have a chain of title to said land, and offered to make and deliver the same to the plaintiff, because by the commencement of the suit the defendant was notified that the plaintiff did not intend to abide the alternative expressed in the instrument sued on; that it was necessary that the defendant should have been in a condition, or able, to make and deliver a full chain of title according to the condition or stipulation of the instrument sued on, before the instrument fell due, in order to entitle him to his defence, although the plaintiff may have waived making titles to him at the time of the offer to do so, and that a patent from the United States for the land was necessary to a full chain of titles."

Upon hearing this motion, the presiding Judge passed an order, setting aside the verdict and awarding a new trial, and this decision is the error complained of in this case.

UNDERWOOD & SMITH, for the plaintiff in error.

D. S. PRINTUP, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The only question in this case, as it has been argued be-

fore us, is: Are the certificates, issued by the receiver from the Land Office, for the government price or purchase money, for the land in question, in the State of Alabama, sufficient evidence of title to enable the holder thereof to recover and hold the lands according to the Laws of that State? If they are, the plaintiff, Coulter, is not entitled to recover, as it is clear that the defendant has either caused to be made, or offered to do so within time, titles to the plaintiffs under these certificates. We think that these certificates vest the title to the land in the holder, so as to enable him to sue for, recover, and hold the lands under the Laws of Alabama. And that the offer of the defendant, Moore, to make, or cause to be made, titles to the plaintiff under the same, was a sufficient compliance with the terms of his agreement to defeat the plaintiff's right to recover the two thousand dollars sued for. By an Act of the State of Alabama, of December 24th, 1812, it is enacted: "That all certificates, issued in pursuance of any Act of Congress, by any of the Boards of Commissioners, Register of a Land Office, or any other person duly authorized to issue such certificates upon any Warrant, or Order of Survey, or to any donation or preëmption claimants for any lands in this Territory, shall be taken and received as vesting a full, complete and legal title in the person in whose favor the said certificate is granted to the lands therein mentioned, and his, her or their assigns, so far as to enable the holder of such certificates to maintain any action thereon, and the same shall be received in evidence as such in any Court in this Territory." *Toulmin's Dig. Laws of Ala.*, 248. This Act is substantially incorporated in the Code of Alabama, and is, so far as we have been able to see, now the Law of that State. See § 2292 *Alabama Code*, p. 426. Although these certificates are not within the words of these Acts, yet they are manifestly within their sense, and must be judged of accordingly. Without going through the various Acts of Congress, to see what are the duties and powers of the receiver, and the legal effect of these certificates, it will be sufficient to dispose of this question to refer to an adjudication of the Supreme Court of the United States, in which the duties and powers of that officer, and the effect of these certificates as evidence of titles are pretty fully stated. I refer to the case of *Carroll vs. Safford*, 3 *How.*, 8. C., 441. The lands in controversy in that case were in a

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like situation to these in this case; that is, the lands have been entered, paid for and certificates given by the Receiver as in this case. Afterwards, and before patents issued, taxes were assessed on the lands, and they were sold for the payment. On a bill filed to set aside this tax-sale, on the ground that the lands were not subject to assessment of taxes, and the titles were in the Government and not in the holder of the certificate, the Court held, that, "When the land was purchased and paid for, it was no longer the property of the United States but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent." "It is said that the fee is not in the purchaser but in the United States until the patent shall be issued. This is so technically at law, but not in Equity. "The land in the hands of the purchaser is real estate, and descends to his heirs. Now, why cannot such property be taxed by its proper denomination, as real estate? In the words of the Statute: as lands owned by non-residents?" Again—"Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are concerned, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the Government had sold a tract of land, received the purchase money and issued a patent certificate—can it be contended that they could sell it again and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the Government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser, and any second purchaser would take the land charged with the trust."—"The Government has no right to refuse a patent to a bona fide purchaser of land offered for sale." "The land should be estimated at its full value as the owner having paid for it is subjected to no additional charge for the obtainment of the patent." It appears, therefore, that the holder of the certificate is in fact the owner of the land mentioned, and he has not the legal title technically, his is a perfect Equity; that, in this State at least, without the aid of such a Statute as that of Alabama, is sufficient to support a recovery in Ejectment, as has constantly been held by this Court, from *Pitts & Bullard*, 3 *Kelly*, 5, down to the present time.

As the verdict of the Jury was for the defendant, and in accordance with our conviction of the rights of the parties upon the facts, the Judgment of the Court below, in granting a new trial, must be reversed.

There is another view of this case that has been neither argued by counsel nor considered by this Court, but to which I desire to call attention of those interested in the question :

The facts show that the parties had exchanged lands, or agreed to do so. The defendant agreeing to give this tract in Alabama for one that the plaintiff owned in Georgia somewhere, perhaps, and this agreement was given by the defendant to the plaintiff as an assurance that he would properly convey the same to him, in execution of that contract, precisely as a bond for titles is given, and for the same purposes. In this sense—and what other can the transaction have—what is the two thousand dollars specified but a penalty? And how can it be recovered in this form, when it cannot be in any other? Is not the plaintiff's damages in this as it is in all other like cases—what he has actually sustained and no more—and that is the value of the land in case no title is or can be made? I merely throw out these questions as suggestions of my own, which, in my opinion, must have controlled the plaintiff's right to recover, had we come to a different conclusion on the case as argued.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in granting a new trial in this case.

*Webster vs. Brazelton et al.*WEBSTER *vs.* BRAZELTON *et al.*

When a bill is filed to rectify a deed of gift, and upon satisfactory proof, supported by strong corroborating circumstances, the Jury decree for the complainant, and the Circuit Judge refuses to grant a new trial, this Court will not disturb the Judgment, especially where the question is one of fact only.

In Equity, in Floyd Superior Court. Tried before Judge HAMMOND, at the July Term, 1860.

This was a Bill in Equity, exhibited by Mrs. Melissa C. Brazelton, in behalf of herself and as the next friend of her minor children, Walter M. Brazelton, Olivia E. Brazelton and Melissa J. Brazelton, in which she alleges:

That, in the year 1845, she intermarried with one Gustavus V. Brazelton, and that said minor children are the lawful issue of that marriage; that, in the year 1850, her father, Hardy Howard, made and executed a deed of gift, of which the following is a copy, to-wit:

"Georgia, Floyd county.—Know all men by these presents, that I, Hardy Howard, of the county of Jackson, State aforesaid, have this day given and bequeathed to my daughter, Melissa C. Brazelton, and her heirs, a certain negro girl by the name of Ann, about five years old. Said girl I consider worth four hundred dollars, which will be counted out of my estate at that sum to my daughter, Melissa C. Brazelton. In testimony whereof, I have hereunto set my hand and seal, this February 18th, 1850.

"HARDY ^{his} ~~X~~ HOWARD.
mark

"Test.: HARTFORD HOWARD."

Which deed was recorded on the 5th of February, 1856, in the Clerk's Office of the Superior Court of said county of Floyd; that, before and at the time of executing said deed, it was the intention of the said Hardy Howard that the said deed should be so framed as to give the said negro girl, Ann, to the complainant, during her life, free from the then or any future contracts or liabilities of her husband, and after her death, the said negro girl to be the property of her children, equally; that the said Hardy, being unable to write, at the suggestion of the said Gustavus V. Brazelton, he procured one Walter R. Webster to write the deed, with instructions

to make it speak the intention of said Hardy, as before stated; that said Webster drafted said deed, intending it to be, and supposing it was, a conveyance of said negro girl to the complainant's sole and separate use during her life, remainder to her children equally, but by mistake, and in consequence of his ignorance of the words necessary to carry out said intention of said Hardy, said Webster drew the deed in the form aforesaid, so as to give said negro girl to the complainant and her heirs absolutely; that said Hardy was told that the words, in which the deed was expressed, did carry out his intention, and executed the same under the influence of such a belief; that the deed and the negro were delivered to Gustavus V. Brazelton, and received by him, with a knowledge of the intention aforesaid of the said Hardy, and that the said negro was used by him for the benefit of complainant; and her said children, up to the time of his death; that, after the death of said Gustavus V. Brazelton, the said Webster applied for and obtained letters of administration on his estate, and also obtained leave to sell, and advertised said negro girl for sale, on the first Tuesday in September, 1856, as the property of the estate of the said Gustavus V. Brazelton; that complainant interposed a claim to said negro, which is now pending on the appeal in said Superior Court; that the estate of the said Gustavus V. is insufficient, even with said negro girl, to pay off its debts, and if said Webster is permitted to go on and sell said negro, and distribute the proceeds as administrator, the intention of the said Hardy will be defeated, and the complainant and her children will be deprived of a benefit which he intended to secure to them.

The complainant prays: That the said Webster and the said Hardy Howard may answer the charges in the bill; also that the deed of gift may be reformed; and the complainant may have such other relief as is called for by the facts of her case.

The answer of Hardy Howard fully admits the charges and allegations of complainant's bill, and states further: That, about the time the deed was executed, he proposed to the said Gustavus V. Brazelton to go to Rome and procure a Lawyer to draft the deed, to which said Gustavus replied that Webster had read Law, and knew as much about it, as any Lawyer in Rome; that defendant proposed to go with

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said Brazelton to see Webster, but there being but one male at the house, the said Brazelton went alone, saying at the same time that he would give Webster the instructions necessary to carry out defendant's intentions; that, when Brazelton returned with the deed written, the defendant doubted whether it was properly worded so as to effect his purpose, and so stated to Brazelton, to which he replied Webster said, if the deed were drawn as defendant wished it would be void by the Law against entailed estates, that, as the deed was drawn, was the proper form to carry out the defendant's intention, under which assurance of belief the defendant signed the deed; that it never was his intention to give said negro to Brazelton, or to give the negro in such a way as that she could be taken from the defendant's daughter and her children.

The answer of Walter R. Webster to the complainant's bill admits the identity and relationship of the parties; the death of Gustavus V. Brazelton, and that he is administrator of his estate, and had obtained leave, and was proceeding to sell the negro, as charged; that the claim was in dispute and is pending, as complainant alleges; that the estate of said Brazelton cannot pay its debts, even with the negro girl; that said Brazelton brought said negro from Jackson county and had her in his possession twelve months, or thereabouts, before the deed was made; that defendant drafted the deed at the request and in exact accordance with the instructions of said Brazelton; that he did not see the deed executed, and does not know what the said Hardy Howard's intention or purpose was, nor does he know what instructions Hardy Howard gave Brazelton, as to the wording of said deed.

In addition to the bill and answers, the following testimony was adduced on the trial of said case, to-wit:

Hartford Howard, testified: That he witnessed the execution of the deed of gift, writing Hardy Howard's name, and he making his mark; that, in making said deed, it was his avowed purpose of the said Hardy Howard to give the negro to said Brazelton and her children, giving as a reason therefor that Brazelton was of dissipated habits; that said Hardy Howard obeyed to, and refused to sign, the deed of gift, in any manner that would place the negro girl, Ann, in or under the control of Brazelton; that Brazelton expressed himself satisfied with the deed to his wife and children, and said he had

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lief it was made to them as to himself; that, when Brazelton brought the negro girl from Jackson to Floyd county, Hardy Howard refused to make a bill of sale for the negro to Brazelton, at which he became angry, but returned next day and said that he had consulted Webster, and would take the deed as Howard wished it.

It was also proven, by the records of the Ordinary's Office, that, after the death of Brazelton, in August, 1854, Webster was appointed administrator of his estate, and in November, 1854, had all the property inventoried appraised, except the girl Ann, and that afterwards, on the 10th of July, 1856, a second appraisement of said estate was had which included the negro girl, Ann, alone, and that an order, to sell her, was passed: the tax book showed that Webster gave in the negro girl to be taxed, as the agent of Mrs. Brazelton, and as her property.

It was also shown that Brazelton used and controlled the negro girl, from the time he brought her from Jackson to Floyd county up to the time of his death, and spoke of selling her, and did try to sell her, and exercised the same acts of ownership over her that he did over his other negroes.

The Jury rendered a decree that the deed of gift be reformed, so as to convey the negro girl, Ann, to Melissa C. Brazelton, for her sole and separate use, (free from the control of her husband, and free from any liability on account of any contract, which her then, or any future, husband may make,) during her life, and at her death, the negro girl, Ann, with her increase, shall go to the children of said Melissa, equally: and that the claim case be perpetually enjoined.

Whereupon, counsel for Webster made a motion for a new trial of said case, on the following grounds, to-wit:

1. Because the verdict of the Jury was contrary to evidence.
2. Because the verdict was contrary to Law and evidence.
3. Because the verdict of the Jury was strongly and decidedly against the weight of evidence.
4. Because the verdict of the Jury was contrary to the charge of the Court in this: The Court charged the Jury that, in order to reform the deed, it must be fully and satisfactorily proved that the parties to the deed, one and all, must have been mistaken as to its terms.

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5. Because the verdict of the Jury is without evidence there being no evidence whatever of the terms that were to be inserted in the deed.

The presiding Judge refused the new trial, and that decision is the error complained of in this case.

D. R. MITCHELL & J. W. H. UNDERWOOD, for the plaintiff in error.

T. W. ALEXANDER, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Melissa C. Brazelton is the daughter of Hardy How and the widow of Gustavus V. Brazelton. Gustavus V. Brazelton is dead, and Walter R. Webster, who administered on his estate, proposes to sell a negro woman, as the property of his intestate. Melissa C. Brazelton files her bill to prevent the sale, alleging that the deed of gift made by father to her, and which, by operation of Law, vested property in her husband, was not drafted so as to speak the pure intention of the donor, and praying that it may be reformed.

Webster himself was the scrivener. The instrument conveys the slave to Mrs. Brazelton and her heirs, and the writer supposed that it vested a separate estate in Mrs. Brazelton and her children. The proof, however, satisfactorily shows that it was the understanding and purpose of the parties to protect the property from the marital rights of the husband. It is apparent that the Mr. Webster, the draftsman, thought, and this is inferrible, not only from the words of the paper—"to Mrs. Brazelton and her heirs"—but at the death of Brazelton he had no inventory made of the negro. And that is not all. He gave her in to the Tax collector as the agent of Mrs. Brazelton, and not as the administrator of her husband. The two Howards—father and son—swear positively to the mistake, and all the circumstances corroborate their testimony. Upon the proofs submitted, the Jury decreed for the complainant. The Circuit Judge refused to grant a new trial, and we think, rightfully.

Speer vs. Wilkins et al.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

SPEER vs. WILKINS *et al.*

The condition of the above and foregoing obligation is such that, whereas the said Zadock Ford has this day taken possession of the money, notes, accounts, books, goods, and every thing belonging to the late firm of Ford & Speer, and agrees to pay all the firm debts. Now should the said Zadock Ford pay all the demands, debts or claims against said firm, or cause it to be done, and save the said Hugh L. Speer harmless, then this bond to be null and void, otherwise to remain in full force and virtue." *Held*, 1st. That this was a sale by Speer to Ford, and not an assignment in trust. And 2d. That being a sale, Speer was a specialty creditor only, and entitled to damages to the extent of the firm-debts which he had paid.

In Equity, in Heard Superior Court. Tried before Judge HAMMOND, at the March Term, 1860.

Hugh L. Speer, as the Administrator of the estate of Zadock, filed a bill in equity in the Superior Court of Heard County, against the heirs and creditors of said deceased, for the purpose of marshaling the assets of said estate, and seeking direction as to the payment of the debts against the same.

The complainant, amongst other things, alleged: that he and deceased were once partners in trade, doing business under the firm name and style of Ford & Speer, and that on the dissolution of said firm, the complainant turned over the entire assets of the same to the said deceased, under the following agreement, executed and delivered by deceased to complainant, to-wit:

"Georgia, Heard County.—Know all men by these pres-

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ents, that I. Zadock Ford, am held and firmly bound unto Hugh L. Speer, in the just and full sum of twelve thousand six hundred dollars, for the true payment of which I bind myself, my heirs, my executors and administrators, jointly and severally, firmly by these presents. Sealed with my seal and dated this the 22d of November, 1850.

"The condition of the above and foregoing obligation is such, that, whereas the said Zadock Ford has this day taken possession of the money, notes, accounts, books and goods, and everything belonging to the late firm of Ford & Speer, and agrees to pay all the firm debts. Now, should the said Zadock Ford, well and truly pay all the demands, debts or claims against said firm, or cause it to be done, and save the said Hugh L. Speer harmless, then this bond to be null and void, otherwise, to remain in full force and virtue."

"ZADOCK FORD." [L. s.]

"Test: HIRAM McDONALD.

The bill further alleged: that the bill is not sufficient to pay all the debts and liabilities against it; that the complainant holds individual notes given by deceased, amounting to \$431 75, and that he, the complainant, had to pay the debts against the said firm of Ford & Speer, amounting to \$1,500, and that he will have to pay other debts against said firm, amounting to at least the sum of \$3,000.

The complainant, among other things, prays: "that he may be decreed as holding the money, notes, accounts, books and goods, of the value of six thousand three hundred dollars, so taken possession of by said Ford, in his lifetime, as trustee, as the own right and property of the complainant, and not in anywise subject to the payment of the debts and liabilities of the said deceased, and that the complainant may be directed and decreed to apply the partnership effects of said Ford & Speer, to the partnership liabilities, before the same, or any portion thereof, shall be applied to the payment of the individual liabilities of said deceased."

On the trial of the case, in the Court below, the presiding Judge decided that the bond or obligation aforesaid, evidenced an absolute sale by Speer, to Ford, of the money, notes, accounts, books and goods of the firm, and not a trust for the benefit of said Speer: and this decision is the error complained of in this case.

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C. W. MABRY and B. H. BIGHAM, for the plaintiff in error.

FEATHERSTON & OLIVER, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Hugh L. Speer and Zadock Ford were once partners in merchandize. Speer turned over to Ford, in the lifetime of Ford, everything belonging to the firm—money, books, notes, accounts, goods, &c.—in consideration of which Ford agreed and obligated himself, by writing under seal, to pay the debts of the concern, and to save Speer harmless. At the death of Ford a portion of these assets were still on hand and passed into the possession of his legal representative. Speer has paid a portion of the partnership debts, and the estate of Ford being insolvent, Speer insists that the firm-debt, thus paid by him, have priority over the separate or individual debts of Ford, to the extent of the partnership assets which were on hand at the death of Ford. And this presents the only question in this case.

It is admitted, and such is the Law, that if the transfer from Speer to Ford constituted a sale, then Ford, as to the firm-debt which he has paid, stands upon the same footing with the individual creditors of Ford. Was it a sale? It is in these words:

“Georgia, Heard county.—Know all men by these presents, that I, Zadock Ford, am held and firmly bound to Hugh L. Speer, in the just and full sum of twelve thousand six hundred dollars, for the true payment of which I bind myself, my heirs, executors and administrators, jointly and severally, firmly, by these presents. Sealed with my seal and dated this 22d November, 1850.

“The condition of the above and foregoing obligation is such, that whereas the said Zadock Ford has this day taken possession of the money, notes, accounts, books and goods, and everything belonging to the late firm of Ford & Speer, and agrees to pay all the firm-debts. Now, should the said Zadock Ford, well and truly pay all the demands, debts or claims against said firm, or cause it to be done, and save the

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said Hugh L. Speer harmless, then this bond to be null and void, otherwise to remain in full force and virtue."

"ZADOCK FORD." [L. S.]

"Test: HIRAM McDONALD."

It will be perceived that Ford acknowledges that he had taken possession of all the partnership assets, and agrees to pay all the debts. Here, then, are the essential elements of a contract. Ford not only agrees to pay "all the demands, debts and claims against the firm, or cause it to be done," but also "to save Hugh L. Speer harmless." Suppose the debts had doubled the value of the assets, would not Ford have been bound to pay them? And, if less, would he not have been entitled to the overplus?

But the controlling feature in constructing this instrument is this: it is not stipulated that debts are to be paid with the assets, but they are to be paid irrespective of them. Suppose Ford, in his life-time, had been wasting these assets, could Speer have gone into Equity and got relief by alleging that, under this agreement, this fund was to have been applied to the firm-debts, and asking a Receiver to be appointed to take possession of the assets and applying them to that purpose? The bill would have been dismissed upon Demurrer, for want of Equity. The contract is not assignment in trust. It gives no lien upon these assets.

If this be so, can this lien be set up after the death of Ford? If he has failed to pay the firm-debts and save Speer harmless, as he undertook to do, his bond is broken, and Speer is entitled to his damages, the amount of which will be the firm-debts he has paid. He is a speciality creditor to this extent, nothing more.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

THARP vs. ANDERSON.

The defendant, against the consent of the plaintiff, employed a negro man belonging to the plaintiff, to cut timber for him. While so engaged, the negro received an injury from the fall of a tree, from which the negro, after being returned to the plaintiff, died. *Held*, for this defendant is liable, in Trover, for the negro

Trover, in Heard Superior Court. Decision made by Judge HAMMOND, at the March Term, 1860.

This was an action brought by the plaintiff against the defendant, to recover damages for the alleged conversion of a negro man slave named Jeff, of dark color, twenty years old, worth twelve hundred dollars, and worth, for hire, one hundred and fifty dollars per annum.

The testimony on the trial, disclosed the following state of facts, to-wit :

In the month of July, 1858, the defendant applied to one Joshua F. A. Tharp, who was at the time the superintendent of the business, plantation and hands of the plaintiff, to permit him, the defendant, to employ the negro boy Jeff (which was one of the hands belonging to the plaintiff, and then under the control of the said Joshua F. A. Tharp) to work for him, which application was refused; that, notwithstanding such refusal, the defendant went on and employed said negro boy without the consent of the plaintiff, or of said superintendent, to cut logs, and that in cutting down a tree, it fell and lodged between two other trees, and could not fall to the ground until it was cut off from the stump; that the defendant sent said negro boy to cut the said tree from off the stump, in the doing of which the butt of the falling tree flew round and struck said negro, injuring him so that he died of the injury within twenty-four hours thereafter; that after being injured, the negro boy was immediately carried to the plaintiff's house, and there he died; that the boy, at the time he was injured, was worth fifteen hundred dollars, and was also worth, for hire, one hundred and fifty dollars per annum. The plaintiff then closed her testimony.

When the plaintiff closed her testimony, counsel for the defendant moved the Court to dismiss said case, on the ground that the plaintiff had not made such a case, by the

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proof, as entitled her to recover in the form of action adopted.

The presiding Judge sustained the motion and dismissed the case, and this decision is the error complained of in this case.

C. W. MABRY, for the plaintiff in error.

BIGHAM & CROCKET, for the plaintiff in error.

By the Court.—LYON, J., delivering the opinion.

The action of Trover in this case was well brought. The defendant had wrongfully taken the negro, the property of plaintiff, and converted him to his use. For this Trover lies. The re-delivery of the negro to the plaintiff does not bar the action, but only goes in mitigation of damages. *Butler, N. C.*, 44. So every unlawful taking, having the effect of altering the nature of the property, is a conversion. 2 *Geo.*, and case cited. Any use or disposition of a chattel, without the consent of the owner, and inconsistent with his right, is a conversion. 1 *Bailey*, 346. The same principle is recognized in *Liptrot vs. Holmes*, 1 *Kelly*, 391. Any number of authorities might be collected directly on the point, as we think the adjudication of the Court on the point must control the case. In *Collins vs. Lyons*, 18 *Geo.*, 648, the plaintiff sent his negro to mill, and, while there, the water-wheel got out of order. The negro, in assisting to raise the wheel, received a blow, by the lever falling, which caused his death. The defendant being present, it was held that he was liable in an action of Trover. The defendant in this cause, against the consent of the owner, put the negro to his own use, and while so employed received an injury which caused his death. We hold that he is liable to the plaintiff thus occasioned in an action of Trover. The non-suit granted must be set aside.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in granting a non-suit and dismissing plaintiff's action.

MCKINNEY *et al.* vs. BURNS *et al.*

Where a son-in-law executes a deed to his father-in-law, to a lot of land, and at the same time releases a debt to him, provided he will convey the title in trust to the wife and children of the grantor, and to enable him to do so. Equity will either enforce a specific performance of the agreement—it not being denied by the grantor—or decree a resulting trust to the land in favor of the grantor.

In Equity, in Floyd Superior Court. Tried before Judge HAMMOND, at the July Term, 1860.

This was a Bill in Equity, filed by Henry Burns and his wife, Cynthia Burns, formerly Cynthia McKinney, and their minor children, suing by the said Henry Burns, as their father and next friend, against John McKinney and Charles McKinney, administrators of Samuel McKinney, deceased.

The bill alleges: That, in the year 1849, Henry Burns purchased and paid for, out of his own funds, the undivided half of lot of land number 96, in the fifth district of the fourth section of originally Cherokee, now Floyd county, obtained a deed for the same, went into the possession thereof, and has so remained, using and receiving the profits of the land up to the time of filing the bill; that, in the early part of the year 1850, being in need of money, he called on Samuel McKinney, his father-in-law, for the sum of \$150 00, which the said Burns, in the year 1836, had deposited with the said Samuel McKinney, to aid in the purchase of, and payment for, a negro girl for the said Cynthia, the daughter of Samuel McKinney, and wife of said Burns; that the said Samuel McKinney agreed to pay the said sum of \$150 00, provided Burns would make a deed to, and vest the title to said land in the said Samuel McKinney, so as to enable him to settle the same upon the said Cynthia and her children: that said agreement was made and carried out by the said Burns, making the deed to said Samuel McKinney, and said Samuel agreeing to make a conveyance of the land in trust for the wife and children of the said Burns; that there was no other cause, or consideration, or inducement for the deed made by Burns to McKinney, except that herein before stated; that said half lot of land is now, and was then, worth four hundred dollars in cash, and that the said Samuel Mc-

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Kinney died on the 10th day of March, 1858, without ever having made a conveyance of said land in trust for the sole and separate use of the said Cynthia and her children, as he had agreed to do; that the said defendants obtained letters of administration on the estate of said Samuel McKinney, and also obtained leave to sell, and actually advertised said land for sale, and will sell the same on the first Tuesday in January, 1856, unless restrained by process from a Court of Chancery.

The bill prays an injunction, restraining the defendants from selling the land; also a discovery of the facts charged; and, also, a specific performance of the agreement to convey the land in trust as set forth in the bill; and, also, for general relief.

The answers admit all the charges and allegations in the bill, except the charge that Burns had deposited \$150 00 with Samuel McKinney in 1836, to aid in buying a negro girl for Mrs. Burns. This charge they ignore. The answers also aver a disbelief of the charge in the bill as to the agreement by Samuel McKinney, to convey said land in trust for the sole and separate use of Mrs. Burns and her children, and state that, according to the knowledge, information and belief of the defendants, the facts really were as follows: That Burns, being in need of money, and his property about to be sold, applied to Samuel McKinney for aid, and that such aid was furnished, and that the deed from Burns to Samuel McKinney was taken to secure the said Samuel, and at the same time to secure a home for his daughter, the said Cynthia, and her children; that Samuel McKinney, no doubt, intended to convey said land in trust as charged in the bill, and may have, and doubtless did, avow such a purpose in the presence and hearing of Burns, but that there was no stipulation or agreement to do so.

In addition to the bill and answers, the following testimony was adduced upon the trial of the case, to-wit:

Shadrach Farmer, testified: That he wrote and witnessed the deed from Henry Burns to Samuel McKinney for land in controversy; that John McKinney, one of the defendants, was present, and told witness that his father, the said Samuel, wanted witness also to write a deed from the said Samuel to Mrs. Burns and her children, but this last deed was not written because Samuel McKinney was not present to exe-

cute it; there was no money paid or note given to Burns for his deed, and it was understood at the time that, in consideration of the deed from Burns, Samuel McKinney was to reexecute to Burns' wife and children.

Daniel Lowery, testified: That he knew the land, and that it was worth in 1850, and at the time of trial, the sum of \$400 00, and that John McKinney, one of the defendants, said that his father, Samuel McKinney, was to make a deed for the land to Burns' wife and children.

John J. Fisher, testified: That John McKinney, one of the defendants, said both before and after the execution of the deed from Burns, that, in the arrangement, Samuel McKinney was to secure the land to Mrs. Burns and her children, and after the death of Samuel McKinney, the said John McKinney expressed regret that the arrangement was not completed.

Theophilus Little, testified: That Burns paid the first purchase money for the land, for witness was his security for it; that John McKinney has frequently told witness that Samuel McKinney was to secure the land to Burns' wife and children, so that they should never be disturbed in its enjoyment, if Burns would make him a deed, and that he, Samuel, would pay off the fi fas against Burns, being about \$150 00.

George K. Smith, testified: That he had several conversations with Samuel McKinney about the land in controversy; that a short time before his death, Samuel McKinney called at his office, at Stone Mountain, to have a deed written, so as to secure the land to the wife and children of Burns, so that it could not be taken for Burns' debts, and so that Mrs. Burns and her children would have a home safe; that witness was to write the deed that day, and would have done so, but that Samuel McKinney went out, and when he returned was intoxicated.

William Garrett, testified: That he was present, in January, 1844, when Burns called on Samuel McKinney for some money that Burns had left with McKinney to aid in buying a negro girl; that McKinney told Burns he had better not take the money then, for fear of a fi fa which might interfere in some way; that Burns told him the fi fa was settled; McKinney then said there was no chance to get the money then, as he had loaned it out; that, at another time,

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witness was at Samuel McKinney's house, and Burns, being there also, said that he was not going away without his money, and that Burns and Charles McKinney were on their horses, and said they were going to try to get Burns' money.

The testimony being closed, the Court charged the Jury:

"That, if they believed, from the testimony in this case, that Samuel McKinney used Burns' money in the purchase of the land, notwithstanding there was no evidence of the trust in writing, still a trust resulted, and the complainants were entitled to recover."

Counsel for the defendant then requested the Court to charge the Jury:

"That, if they believed, from the facts in this case, that Burns did let Samuel McKinney have this money in 1836, the claim was barred after four years, and if more than that time had elapsed, and McKinney refused to pay the same, unless Burns would make the deed, and McKinney did pay it upon the receiving the title, then it was McKinney's own money and a trust could not result." The Court charged such to be the Law, but added: "But, if McKinney did not see proper to take advantage of the Statute, but recognized the debt, then the lapse of time would not operate to bar the claim, and complainants would still have a right to recover."

The Jury returned a verdict for the complainants, that a resulting trust be declared and set up in Henry Burns, to the premises mentioned in the bill, and that the administrators of Samuel McKinney be enjoined from further efforts to sell said land, and that the defendants pay the costs of suit.

Counsel for defendants then made a motion for a new trial of said case, on the following grounds:

1. Because the Court erred in holding that, under the parol testimony in this case, a trust could be set up at all.
2. Because the Court erred in holding that parol testimony was competent in this case to establish a trust, when the deed from Burns to McKinney contained no such terms, or conditions, as are alleged to have been agreed on by the parties.
3. Because the Court erred in charging as he did, and in adding, to the request of defendant's counsel, as before stated.
4. Because the verdict is against Law and evidence, and the weight of evidence.

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The Court refused the new trial, which is the error assigned.

T. W. ALEXANDER, for the plaintiffs in error.

J. W. H. UNDERWOOD, for the defendants in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Burns, in 1836, placed in the hands of McKinney, his father-in-law, \$150 00, to purchase a negro to be settled upon Burns' wife and children—the daughter and grand-children of McKinney.

In 1849, Burns bought the one-half of a lot of land, and needing money, he called upon McKinney for the \$150 00 which he had never invested in a negro, as he promised to do. McKinney made some effort to raise the \$150 00. He proposed to Burns that if he would make him a deed to the land which he, Burns, and his family, were living on, he could convey the same in trust to and for the separate use of Burns' wife and children. And the deed to McKinney was executed, no money being paid by McKinney, or note given, or the payment of the purchase money secured in any other way. McKinney acknowledged this agreement to the day of his death, which occurred in 1855; and, having made several unsuccessful attempts to have a deed drawn in pursuance of his agreement—which he never denied or repudiated—died, leaving the title in this condition, and Burns and his family in possession of the lot of land, which they have occupied ever since 1849, when it was bought and paid for by Burns.

The administrators of McKinney have advertised the land for sale, and the bill in this case is filed to stop the sale and to have a conveyance executed, according to the agreement between McKinney and Burns, or a resulting trust declared in favor of Burns, and this the Jury have decreed shall be done.

It is contended that a parol trust to the land cannot be engrafted on the absolute deed from Burns to McKinney. There is no attempt to do this. The legal title was conveyed to McKinney merely to enable him to pass it over to Mrs. Burns and her children. The deed is founded upon no con-

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sideration good or valuable. The title was conveyed to him for a particular purpose. It ~~operates as a power merely~~. Powers of Attorney are frequently executed in this way, and any attempt to hold or appropriate the land under such a power would constitute a fraud, against which Equity would grant relief.

And then, in the other aspect of the case, McKinney paid nothing for the land—Burns paid \$150 00 for it—does not this constitute a resulting trust in favor of Burns? It is said, this doctrine don't apply where the grantor and he who pays the money are one and the same person. This may be so. None of the authorities cited sustain this distinction.

The justice of this case is with the finding of the Jury, and we agree that it ought to stand.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.



HAMBRIGHT *vs.* STOVER.

1. When the plaintiff does not vest his right to recover on the ground that he is an innocent holder, and without notice, and the note is payable to bearer, and seeks a recovery on the merits of the contract, the defendant cannot inquire into the title for the single purpose of defeating a recovery.
2. A general warranty of unsoundness does not extend to future casualties of partition.

Complaint, in Floyd Superior Court. Tried before Judge HAMMOND, at the July Term, 1860.

This was an action brought by John Hambright, against Jeremiah Stover, to recover the amount due on a promissory note, of which the following is a copy:

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"CALHOUN, TENNESSEE, 25th September, 1854.

"By the twenty-fifth day of December next, I promise to pay J. A. Stover, surviving partner of Chambers & Stover, or bearer, the sum of seven hundred dollars, for value received."

"JEREMIAH STOVER."

To this action the defendant pleaded the general issue; and that the note sued on was without consideration; and that if there was any consideration for the note, the same was a negro girl by the name of Ann, which was never delivered to the defendant as was agreed to be done, and that the negro was unsound, and so defectively formed in the womb, as that she could not give birth to children, and that in giving birth to a child she died, before she was even delivered to defendant.

On the trial of the case the plaintiff introduced in evidence the note sued on, and closed.

The defendant introduced in evidence, a bill of sale from J. A. Stover, surviving partner of Chambers & Stover, to the defendant for a negro woman named Ann, about thirty-six years old, warranted to be "sensible and healthy." The bill of sale was dated 25th of September, 1854, and recited that the purchase price was seven hundred dollars.

The defendant also proved that J. A. Stover was a son of the defendant; that J. A. Stover was one of the firm of Chambers & Stover; that Chambers died first, and left the said J. A. Stover surviving; that after the death of Chambers, the survivor sold a negro woman to defendant, for which the note sued on was given; that the note was found among the papers of J. A. Stover, after his death; that the bill of sale was given for the negro; that at the time of the sale the negro was pregnant, and was left at Mrs. Brittain, she being a midwife, to be attended to and nursed during her confinement; that she was attended by Mrs. Brittain during her confinement; that Mrs. Brittain had attended the negro two or three times before, and that her labor was severe, and the children were either born dead, or died a few minutes after birth; that on the occasion of her last confinement, which was a protracted one, she died, and her child was taken from her after she died; that it was the opinion of Mrs. Brittain, that there was some defect in the womb of the negro; that a post mortem examination of the negro woman was made by two physicians, and that the child was found

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to be outside the womb, and among the bowels of its mother.

The plaintiff proved in rebuttal: That when the defendant's agent came to make the trade for him, said agent directed that the negro woman, owing to the fact that she was far advanced in pregnancy, should be placed in the care of some careful nurse, at the expense of the defendant, and that such was the defendant's request, as stated by the agent.

The plaintiff also proved by the physician that was called to see the negro woman, in her last sickness, and also by another physician who aided in the post mortem examination, that in the opinion of said physicians the negro woman failed to give birth to the child on account of the unusually large size of the child; that the negro died from laceration of the womb, which may occur in cases of a sound, as well as in a diseased womb; that upon a close examination of the negro's womb after death, it was found to be sound and healthy; that the negro died on the 7th or 8th of November, 1854.

After the argument of the case, and after the presiding Judge had charged the Jury, the defendant's Counsel asked the Court to charge the Jury:

"That if they believed the plaintiff in this case was not the bona fide owner of the note sued on, for a valuable consideration, but got it surreptitiously and without authority, from among the papers of J. A. Stover, deceased, they would be authorized to find for the defendant," which the Court charged to be the law, and Counsel for the plaintiff excepted. The Jury found for defendant.

Counsel for the plaintiff then moved for a new trial in said case on the grounds:

1st. Because the Court erred in charging the Jury as requested by defendant's Counsel, as herein before set forth.

2. Because the Jury found contrary to law and evidence. Upon hearing the motion, the Court refused the new trial, and this decision is the error alleged in said case.

T. W. ALEXANDER, for the plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—LYON J., delivering the opinion.

The charge of the Court was erroneous.

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There was no evidence that the plaintiff got the papers surreptitiously, nor anything before the Court to show that the plaintiff was not the legal holder.

The plaintiff did not seek to recover as an innocent holder of the paper, and without notice of the defendant's defense, or the equities subsisting between the maker and payee. On the contrary, he came into Court, claiming title to the paper as administrator of the payee, and was driven from that title by the objection of the defendant, and then placed his right to recover on the merits of the contract—the note being payable to bearer—and in that position, it was immaterial to the defendant to inquire into this title to the note. And here we might rest the case, as a new trial must be granted on that ground. But as the other point—that the verdict was contrary to Law and evidence—is made and insisted upon, we have felt it our duty to pass on that also.

The defence was, that the negro woman, the consideration of this note, was unsound. The woman was pregnant at the time of the sale, and died subsequently from a laceration of the womb, and an inability to give birth to the child, on account of its unusual size, which sometimes happen, say the physicians who treated the negro, in healthy as well as unhealthy women. The laceration, which was the immediate cause of the death, took place at the time and in the effort to expel the offspring. The womb as well as the general health of the woman was otherwise healthy. We do not think this was any evidence of unsoundness of the negro at the time of the sale. A warranty of soundness does not extend to the subsequent casualties of parturition. And as this was the only evidence of unsoundness, the verdict was contrary to Law and the evidence. A new trial must be granted.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in not granting the new trial on the following grounds:

1st. For error: in charging the Jury that if they should believe the plaintiff is not a *bona fide* owner of the note for

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a valuable consideration, but got it surreptitiously and without authority from the papers of J. A. Stover, deceased, they would be authorized to find for the defendant.

2d. Because the verdict was contrary to Law and evidence.

LAUB *et al.* vs. BURNETT *et al.*

1. An Order in Chancery was had, authorizing the husband and trustee to sell certain real estate, belonging to the separate estate of the wife. The wife afterwards becoming opposed to the sale, defendant advised her to file a bill to enjoin the husband from such sale and consented to act as her trustee, or *procliam ami*, in that proceeding, and counsel was employed to file such bill. The defendant subsequently bought the property from the husband, and paid him the money, and, being about to dispossess the wife, &c., she applied for, and obtained, an injunction, restraining him from disturbing her possession, &c. On the coming in of the answer of defendant, admitting these facts, the injunction was dissolved. *Held*, that this was error—the injunction ought to have been retained.

2. One cannot, by his answer, charge and discharge himself.

3. New matter, not in response to the allegations in the bill, cannot be considered in an application to dissolve an injunction, especially when such new matter is immaterial.

In Equity, in Floyd Superior Court. Decided by Judge HAMMOND, at chambers, on the 22d of May, 1860.

Maria Laub exhibited her Bill in Equity, in Floyd Superior Court, against George P. Burnett and another, in which she alleged:

That she was the wife of Andrew M. Laub, and that her maiden name was Maria Norbuck; that, at the time of her intermarriage with the said Andrew M. Laub, she had, and was possessed in her own right, and as her sole and separate estate, the sum of one thousand dollars in money; that, on the 30th of January, 1851, when the complainant and her

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said husband determined to settle in the city of Rome, and desiring to have said money invested in some permanent property, complainant, by petition to the Hon. John H. Lumpkin, then Judge of the Cherokee Circuit, and *ex officio* Chancellor, obtained an order from the said Chancellor, appointing the said Andrew M. Laub, her trustee, and authorizing him to invest said money in the purchase of a part of lot number 3, Etowah division, of the city of Rome, twenty-three feet fronting on Broad street, and extending back one hundred and thirty-two feet; the same being the place on which the said Andrew M. Laub then resided and transacted business; that pursuant to said order, the said trustee did purchase said town lot, and with the income and proceeds of the same did, by virtue of another order of the same Chancellor, purchase the West-half of city lots numbers 4 and 21, in the Etowah division of the city of Rome, lying thirty-two feet front, and running back to Court street, to which city lots deeds were duly executed to said Andrew M. Laub, as trustee for the complainant, conveying to said Andrew M. Laub the said city lots in trust for the use and benefit of the complainant and her then, and future, children by the said Andrew M. Laub, free from the debts, liabilities and contracts of the said Andrew M. Laub, then in existence, or that might thereafter exist; that the said city of Rome was rapidly improving in wealth and population, and that said city lots, from their central location in said city, were then, and would probably continue to be, valuable; that for a year or more prior to the filing of the bill, the said Andrew M. Laub was dissipated and indolent, doing nothing for the support of his family, and leaving the same to be done by the complainant, which she succeeded in doing, partly by the labor of her own hands, and partly by the sale of furniture and wares, belonging solely to her; that the said Andrew M. Laub had never given bond and security for the faithful performance of said trust; that, for some months immediately anterior to the filing of the bill, the said Andrew M. Laub had been threatening to sell and dispose of said city lots, declaring that when he sold them and got the money in his pocket, the complainant and her children might go to hell; that George P. Burnett, being fully aware of all the facts set forth in the bill, advised complainant to file a Bill in Equity against the said Andrew M. Laub, and obtain an in-

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junction, restraining the said Andrew M. Laub from selling said city lots, as he had repeatedly threatened to do; that pursuant to the advice of the said Burnett, the complainant actually employed counsel to file such bill, but before the same was finished, the said Burnett bought said city lots from the said Andrew M. Laub, for one thousand or twelve hundred dollars, or some other small and inconsiderable sum; that said Burnett bought the said city lots with a knowledge of all the facts aforesaid, and with a knowledge of said trustee's habits and threats aforesaid, and after he, the said Burnett, had deceitfully advised complainant to obtain an injunction, restraining such sale; that said Laub sold said city lots to said Burnett without authority, and against the wishes and repeated remonstrances of the complainant, of all which the said Burnett had full notice before he purchased said lots; that, since said sale of said lots to Burnett, Laub has gone to parts unknown to complainant, taking the proceeds of the sale with him, and leaving complainant and five children (four of whom are females and unable to support themselves) in a destitute condition; that the said Burnett has taken violent possession of one of said lots, and rented the house on the same to William Morris, and is receiving, and appropriating to his own use, the rents and profits of the same, and also threatens to dispossess complainant of the other lots; that said Burnett bought said lots from said Laub with a knowledge that Laub was largely insolvent and that he was a gambler, and otherwise dissipated, and that he intended to waste the proceeds of the same; that complainant believed the said Burnett urged complainant to file said bill against Laub in order to induce him under resentment to sell said Burnett said lots at less than their value; that said Burnett has a claim against said trust estate for about three hundred dollars, for which complainant is willing that said city lots should be bound.

The bill prays that the sale from Laub to Burnett may be set aside; that Laub may be removed from the office of trustee of said property; that Burnett may be enjoined from selling said lots or dispossessing the complainant, and that the rent due by Morris may be paid to complainant's trustee; that the bill may be answered, and such other relief measured out to complainant as her case demands.

The injunction prayed for in the bill was issued on the 30th of April, 1860.

The defendant, George P. Burnett, filed his answer to the bill, alleging:

That, according to report, complainant and Andrew M. Laub were never married; that the settlement in trust, made in 1851, as alleged in the bill, defendant was informed and believed, was made to evade the payment of debts, which the said Laub intended to contract in buying cotton, and that the complainant never had any property of her own; that, according to the bill, the whole of the thousand dollars belonging to complainant, was invested in the purchase of the city lot first described in the bill, which city lot has been occupied by complainant's family from the time of its purchase, and that consequently there was no income of said trust estate to be invested in the purchase of the other lots mentioned in the bill; that Andrew M. Laub, at one time, claimed three negroes and personal property, worth one thousand dollars, as trust property under the settlement mentioned in the bill, which claim was untrue and fraudulent; that one of said negroes was sold by the said Laub for one thousand dollars, which money, defendant is informed and believes, complainant got possession of; that defendant had a debt of three hundred dollars against the trust estate, which the trustee had promised to pay out of the proceeds of the sale of the negro aforesaid, but excused himself from complying with said promise, by charging that complainant had stolen the money from him, which the defendant believes was true, or, at least, that the trustee and the complainant disposed of the money by collusion with each other, to avoid the payment of defendant's debts; the defendant admits that said Laub had been trying to sell said lots, and that he may have made use of many improper expressions relative to the proceeds; that said trustee had, on the 26th of December, 1857, obtained an order of the Chancellor of Trusts to sell said city lots, and defendant bought the same from Laub, by virtue of the authority to sell, conferred by said order; the defendant insists that he gave the full value of the lots; the defendant admits that, whilst the said Laub was trying to sell the lots, he did advise complainant to file a bill to enjoin the sale, and to remove him from the office of trustee, but he gave such advice because complainant proposed to have defendant appointed trustee, which he desired in order to secure his debt aforesaid; that complainant did employ coun-

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sel to file such bill, but afterwards abandoned it; defendant did propose and still proposes that, if complainant will pay his debt aforesaid, and also repay the purchase money, paid by defendant to Laub for the city lots, defendant will reconvey the lots to complainant; defendant denies that he took violent possession of one of the houses, but says he applied to complainant for the key, and she said it was lost, whereupon defendant obtained a key that fitted the lock, and opened the door and took possession; defendant has made no attempt or threats to oust complainant from the other lots, but has told her to look around for another home, and that he would give her time to do so.

The defendant sets up in his answer, that complainant and her family are a nuisance to the city of Rome, and charges them with a great deal of improper conduct, which is not responsive to the bill, and has nothing to do with the case made by the bill.

Upon the coming in of the answer, the defendant's Solicitors moved to dissolve the injunction, on the ground that the facts and circumstances, upon which the Equity of the Bill was based, were denied by the answer.

The Judge sustained the motion and dissolved the injunction, and this decision is the error assigned in this case.

D. S. PRINTUP & H. A. GARTRELL, for the plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—LYON, J., delivering the opinion.

1. The defendant admits by his answer, that notwithstanding the order of the 26th of December, 1859, authorizing the husband of complainant to sell the trust property, that the complainant was opposed to the sale by him. That he had advised her to file a bill to enjoin him from such sale; that he had consented to act for her as her trustee, or next friend, in that proceeding, and that counsel had been employed for that purpose, after all of which he bought the property. Such a sale and purchase cannot stand, and the injunction was improperly dissolved.

That part of his answer, in which he sets up her with-

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drawing or abandonment of those proceedings, and subsequent assent to the sale, is not in response to the allegations in the bill, but is new matter and in avoidance of the equities of the bill, and must be supported on the trial by proof.

2. One cannot, by his answer, charge himself and then, by new matter, discharge himself. *More vs. Ferrell*, 1 *Kelly*.

3. That the settlement of this property to the separate use of the wife was not *bona fide*, but to defraud creditors, is also not in response, and if it was, that fact could not avail the defendant, for he is not a creditor of the husband without notice of this settlement, and on the faith of the property being his, nor a *bona fide* purchaser without notice.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in dissolving the injunction.

BEGGARLY vs. CRAFT.

1. Where the damages are excessive, resulting probably from the fact that the whole Law of the case has not been presented so full to the Jury as it should have been, a new trial will be ordered.
2. Where unchastity is imputed to a female, evidence of actual prostitution, two months after the speaking of the words, is not admissible.

Complaint, in Fulton Superior Court Tried before Judge BULL, at the April Term, 1860.

This was an action, brought by Josephine F. Craft, through her father and next friend, George W. Craft, against Clark Beggarly, to recover damages which the plaintiff alleged that she had sustained in consequence of the falsely and mali-

ciously speaking by the defendant of the plaintiff, the following words, to-wit: "She is a girl of bad character; she is a whore; I believe her to be a whore; she keeps the same kind of company that such women keep."

The action was brought in the short form, and the petition conformed to the form prescribed in the Statute, without *innuendo* or *colloquium*.

The defendant pleaded that, if he ever spoke the words as charged, he did so in an effort to have the plaintiff removed from the house in which she then resided, and which was in the immediate neighborhood of the house in which defendant and his family resided; that he had been informed that plaintiff's conduct had been such as to indicate a want of chastity, and that her character for chastity was not good; that her associations were not good, and her house was a place of resort at late and unusual hours of the night for men; and that, in August, 1857, she had carnal connection and sexual intercourse with one F. M. Cranford, who was not her husband.

It appeared from the evidence adduced on the trial, that the defendant, in the spring of 1857, and prior to the commencement of the action, applied to the owner of the house in which plaintiff and her father lived, and also to the agent of such owner who rented the house to plaintiff's father, to have them removed from said house, which was in close proximity to the house in which the defendant with his wife and one child resided; that defendant seemed to be in an angry mood, and a violent passion, when he made the application and complaint, and was very abusive of the plaintiff; that, on that occasion, the defendant said he believed the whole family to be whores, and the plaintiff a damned whore, and he could prove it; that the whole object of defendant seemed to be to get them away from the house in which they then lived, so near to his family.

There was some conflict in the testimony as to the general character of the plaintiff, both in Milledgeville, where she once lived, and in Atlanta, where she then lived. Some of the witnesses testified that she was lightly spoken of, and that common rumor gave her the character of a bold, fast, imprudent, forward and suspicious girl; that she was often seen on the streets and public walks of Milledgeville, unattended, at times when virtuous ladies usually go attended:

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that her general deportment indicated but little self-restraint or self-respect; that she seemed to have been loosely raised, and to be under little, or no family or parental restraint; that her general bearing and carriage were unbecoming a chaste, pure minded girl, and tended to invite the advances of young men: that she was seen to pass about the passenger depot in Atlanta as late as 9 or 10 o'clock at night, in company with a negro woman, known by the name of Lucy Dean, who was at the time hired to her father; that the character of the negro woman for virtue was notoriously bad; that, on one occasion, the negro woman and the plaintiff were passing through the depot and stopped near the Ladies' Saloon, when the negro woman left plaintiff by herself and went off up to the far end of the depot to where some young men were standing; that one of the young men returned with the negro to where the plaintiff was, and the three went off down the road in the direction of the house in which plaintiff lived; that this occurred in the spring of 1857, and between 9 and 10 o'clock at night; that, on another occasion, in June, 1857, a gentleman called at the house of plaintiff's father, when plaintiff rose up from her seat and embraced him affectionately, and when she discovered who it was, she relaxed her embraces and asked to be forgiven, as he was not the man she was looking for, that she was looking for a gentleman from the Washington Hall.

Other witnesses testified: That they had known the plaintiff for some time, and that her character for virtue was good, and her associations reputable, and that until this suit was instituted, they had never heard anything against her character: that some of the witnesses had lived very near to her father, and had an opportunity of seeing her often, and that her general reputation was that of a chaste and virtuous girl.

Pending the trial, counsel for defendant proposed to read the answers of F. M. Cranford to interrogatories taken out in said case, which answers were as follows, to-wit:

"I do know of one person who had sexual intercourse with plaintiff in the months of August and September of 1857, in Atlanta, Georgia, and within about ten feet of the defendant's lot, and on the lot whereon the plaintiff lived, and that person was the witness; I am fully satisfied that plaintiff received other company for improper purposes during the time

that I was visiting her, from what she told me, and I regarded her as a prostitute, and ready to receive men at all times for improper purposes, as my first proposition was made for her meeting me, through a negro woman she had hired, and the plaintiff accepted the proposition and met me through an agreement of that kind for the purposes already stated."

These answers were objected to by counsel for plaintiff, on the ground that they detailed occurrences happening after the suit was instituted, and after the speaking of the slanderous words by the defendant, which objection was sustained by the Court and the evidence repelled, and defendant excepted.

The presiding Judge charged the Jury, amongst other things :

"That the words declared on were actionable *per se*, and upon proof that the same were spoken by the defendant, of and concerning the plaintiff, the plaintiff was *prima facie* entitled to recover, as upon proof of the speaking of words, actionable in themselves, (as the words charged in this case are,) the Law presumes Malice, and no special damage need be proven." To which charge defendant excepted.

The Jury returned a verdict for the plaintiff "for four thousand two hundred and fifty dollars, with cost of suit."

Counsel for the defendant moved for a new trial of said case, on the following grounds:

1. Because the Court erred in deciding and holding that the defendant could not justify, in said case, by proving any specific act of sexual intercourse by the plaintiff, but that evidence of general bad character for virtue and chastity were alone admissible for that purpose.
 2. Because the Court erred in ruling out the answers and testimony of F. M. Crawford, as aforesaid.
 3. Because the Court erred in charging the Jury as herein before set forth.
 4. Because the verdict was without evidence, strongly against the weight of evidence, and contrary to Law.
 5. Because the damages found by the Jury were excessive.
- The Court overruled the motion, and refused the new trial, and defendant excepted.

Counsel for defendant then moved to arrest the Judgment in said case, on the following grounds :

- 1st. Because it is apparent on the face of plaintiff's de-

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claration, that no legal cause for action is set fort therein against the defendant.

2d. Because the words charged to have been spoken by defendant impute no crime to the plaintiff, and no special damage is averred to have been suffered by her on account of the speaking thereof.

The Court overruled the motion and refused to arrest the Judgment; and these decisions, refusing the new trial and to arrest the Judgment, constitute the errors complained of in this case.

BLECKLEY, for the plaintiff in error.

G. B. HAYGOOD, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

After much reflection upon this case, and an earnest effort to arrest its further agitation, we are forced to the conclusion that the damages found by the Jury are excessive, and that on that account the verdict and judgment ought not to stand. There are circumstances, independently of the pecuniary condition of the defendant, which, in our judgment, ought to mitigate the finding of the Jury.

It is true, we cannot hold the defendant excusable for uttering the defamatory words which he did, and in the intemperate language employed by him. Still, if the Jury believed that he was actuated alone from a desire to protect his family from an unworthy neighbor, and from no malice toward the plaintiff, it should have weighed much with them in the assessment of damages. And can any one read the evidence and doubt that this was the motive which influenced the defendant? No other cause is assigned or insinuated. And to whom were the words spoken? To Mr. W. H. Harvel, who rented the lot to the Craft family, and to Mr. S. J. Shackelford, his agent. He complained to them of these people, and insisted upon their removal; and both Shackelford and Harvel testify that the whole object of Beggarly seemed to be to get them away. To show conclusively the motive that prompted the defendant, and at the same time the earnestness and strength of his convictions, he said in the violence of his passion, that if Harvel and Shackelford

did not remove the Crafts, they were as bad as they were. We grant that such words are wholly unjustifiable; still they indicate any thing but the slimy tongue of a slanderer.

And then it is altogether worthy of remark, that to no other human being did the defendant ever repeat this charge. The words were spoken in a strictly business transaction—though in a most indecorous and intemperate manner. The Law, if it cannot forgive always, looks with indulgence upon such communications.

This view of the case did not have its due weight. It was not as permanently presented by the Court as it should have been. His Honor was right in holding that the words spoken being actionable in themselves, upon proof of their being spoken, the Law would infer malice; and that the plaintiff was entitled to recover, without alleging or proving any special damage.

But the same witnesses, be it borne in mind—Harvel and Shackelford—who proved the speaking of the words, testify also to the occasion on which, and the circumstances under which, they were spoken. Here, then, the antidote, to some extent, accompanied the poison, and both in the eye of the Law and of reason, should have been taken into the account.

The plaintiff came from Milledgeville to Atlanta, at the age of fifteen. And while there is respectable testimony in the record, from persons who lived near her in Milledgeville, and with whose families she associated at home and in the Sunday School, that they, the witnesses, never saw any thing improper in her conduct or heard any thing disreputable to her character, there is contradictory evidence upon this point. A number of persons, mostly young men, speak of her as a bold, fast and forward girl of doubtful or suspicious character, and inviting, in her deportment, to the advances of young men. And while they impute to her no act of prostitution, they say her general reputation and conduct were not very good—rude and unbecoming a respectable young girl.

And then, after coming to Atlanta, there are facts, sworn to, which corroborate the impressions she made in Milledgeville. She was seen about the Depot at unseasonable hours, in company with a negro woman hired by her father, by the name of Lucy, of notoriously infamous character. At one time, between nine and ten o'clock at night, this woman left the plaintiff and approaching to where a group of young men

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were standing, conversed with them, when one of the company joined the girl and when the two and the negro walked off together.

It is quite certain that the defendant either heard or saw things which alarmed his fears and justified him, as he supposed, in denouncing this young woman as unfitting to reside so near his family. He may have judged her too harshly. The proof did not justify his accusation. Under all the circumstances, it may have been right in compelling him to answer in damages, but the verdict cannot be justified by the facts of the case.

If parents will permit their daughters to grow up without restraint—to play the wanton in the streets and public places of the city—even if they escape actual pollution, they are not entitled to the same compensation as should be awarded to the modest maiden, who, should ever an impure thought intrude itself, would crimson her cheek with a burning blush, though alone in the solitude of her chamber, and concealed from mortal eye by the deep shades of midnight. This would be to confound all distinction between the pure and the impure.

Slander verdicts, however enormous, cannot preserve the reputation of our daughters, if we suffer them to grow up without domestic restraint; nor will the Founder of families hold such parents guiltless. Governments may enact salutary laws, the ministry may thunder weekly from their pulpits the lessons of the Law, Courts may execute judgment in righteousness, but, unless family discipline be enforced, all other efforts will be in vain, to save the rising generation from ruin and wretchedness, and the land from destruction. Where, amongst us, are the representatives of the women—ay, and the men, too, of the olden time? And yet, to these hot-house plants, with all their immaturity of body and mind, are soon to be committed the destinies of this mighty nation! Who does not tremble in view of this fact?

We repeat, then, had the breath of slander never whispered a reproach against the name of the plaintiff—were she chaste as Diana—unsullied as the snow-drift—were her thoughts as pure as those of the Pilgrim devotee while imprinting a kiss upon his favorite saint—the damages would have been too large, especially considering that the defendant was unable, by reason of his poverty, to give security on

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the appeal in this case, or to prosecute this Writ of Error to this Court.

We think, the Court was right in rejecting the plea and proof of actual prostitution, two months after the words were spoken. Whether offered in order to draw the inference, that, if the plaintiff was actually unchaste in August, she was probably not free from the taint of pollution in June, or to diminish the damages on account of the degradation to which the witness swore she subsequently yielded, we hold, it would be dangerous in the extreme to allow such proof. The charge made was well calculated to stimulate assaults upon the virtue of a young woman, however innocent she might be in her deportment, and then it would become the interest of the defendant to conspire to bring about the result which he imputed. No authority is produced in support of this attempt, and policy forbids the allowance of such testimony.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in not granting a new trial in this case, on the ground that the damages found by the Jury were excessive.

LEMON vs. WRIGHT.

1. A father sent a slave to his son, by "*a little boy*," the child of that son, in the year 1837, calling no witnesses to the gift, and using no words, at the time, creating a trust, or placing any limitations or conditions upon the gift. The son received the slave, treated her as his own, and paid taxes for her as such, and she was generally known as his property; was seized in execution and sold for his debts, but permitted by the purchaser to return to his possession, that he might have an opportunity of redeeming her. *Held*, that in a suit against this son, for the slave, by a vendee of the purchaser at Sheriff's sale, the testimony of defendant's father, (then eighty-five years of age,) taken after a lapse of more than twenty years, that the gift, in 1837, was to the wife and children of defendant, and not to himself, is insufficient to bar a recovery by plaintiff.
2. A parol gift, as above described, cannot, by deed of the donor, made in September, 1839, by procurement by the son, be so qualified as to vest the property in the son as trustee for his wife and children, in prejudice of the rights of a creditor to whom the son became indebted in 1838, who commenced suit for the recovery of his debt, in July, 1839, and recovered judgment in January, 1840; nor in prejudice of the rights of a purchaser of said slave, at Sheriff's sale, under that judgment, as against such creditor or purchaser the deed is a nullity.
3. A., at the request of B. and his wife, purchased certain slaves in the year 1841, and placed them in the possession of B., promising to convey said slaves in such manner as to secure them to the wife and children of B., whenever he should be reimbursed the purchase money and interest. In 1853, not having been reimbursed to any extent, A. conveyed two of said slaves to B., in trust for his wife and children, and one to a daughter of B. At the same time A. took one of the slaves home with him, leaving one undisposed of, in B.'s possession, as before. In 1859 A. made a demand of B. for that one, and, on refusal, commenced this action of Trover for that slave. *Held*, first, that the taking home of two of the slaves by A., in 1853, was no reimbursement under the original agreement, unless he so expressly stipulated at the time of taking them, and did not bar his right of action. Secondly, that, even if reimbursed, A. was entitled, at Law, to recover the slave, to the end that he might convey and deliver her in accordance with his original promise.

Trover, in Spalding Superior Court. Tried before Judge CABANISS, at the May Term, 1860.

This was an action brought by Abel A. Lemon against Charles W. C. Wright, to recover damages for the alleged conversion of a negro girl slave named Ann, and her infant child, Jack.

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The action was commenced on the 26th of April, 1859.

The defendant pleaded the general issue, and Statute of Limitations.

On the trial of the case the following state of facts was developed by the testimony, to-wit:

In the year 1836 or 1837, Joseph Wright sent a negro girl, by the name of Mary, to the house of his son, Charles W. C. Wright, by his little son, intending, at the time, that said negro should go as a gift to the wife and children of said Charles W. C. Wright, but there was no proof of the declaration of that intention when the negro was sent. The negro remained in defendant's possession, and was controlled and used by him, until the 19th of September, 1839, when Joseph Wright executed the following deed, to-wit:

"Georgia, Butts County.—Know all men by these presents, that I, Joseph Wright, of the county and State aforesaid, have this day, and do hereby, for and in consideration of the natural love and affection which I have toward my daughter-in-law, Elizabeth L. Wright, the wife of my son, Charles W. C. Wright, of the county of Jasper and State aforesaid, and her children, by the said Charles, a certain negro woman slave by the name of Mary, aged twenty-five years, and a negro girl slave (child of said Mary) about three years old, by the name of Sarah, to hold said negro slaves unto the said Elizabeth L. Wright and to the heirs of her body, by the said Charles, forever, together with all the increase of said negro woman and child. And I do hereby appoint my son, the said Charles W. C. Wright, the trustee to take charge of and protect the said woman and child, Mary and Sarah, and their issue, for the use of the said Elizabeth L. Wright, and the use of the heirs of her body, by the said Charles, to whom alone they belong, against all other persons whatsoever. In witness whereof I, the said Joseph Wright, have hereunto set my hand and affixed my seal, this 19th day of September, 1839.

"JOSEPH WRIGHT, [SEAL.]

"In presence of—

"B. H. SPENCER, and B. H. DARDEN, J. I. C."

This deed was recorded in the Clerk's Office of Jasper Superior Court, the 2d day of October, 1839.

On the 7th day of April, 1840, the negro woman, Mary, and her child, Sarah, and also another child of hers by the

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name of Harriet, were sold at Sheriff's sale, by the Sheriff of Jasper county, Georgia, under a fi fa from the Inferior Court of Jasper county, in favor of Anthony Dyer, assignee, against Charles W. C. Wright and Samuel A. Flournoy, makers, and Thomas H. B. Rivers, endorser, upon a Judgment obtained in said Inferior Court, in an action commenced on the 2d day of July, 1839, on a note given the 8th of January, 1838. The fi fa was dated the 4th of January, 1840.

When the negroes were offered for sale by the Sheriff, the defendant, Charles W. C. Wright, procured Joshua Hill, Esq., to announce to the by-standers that the title to the negroes, Mary, Sarah and Harriet, was not in said Charles, and said Hill, at the instance of said Charles, also read the deed from Joseph Wright, before stated. This announcement had the effect to prevent competition in bidding for the property.

Thomas H. B. Rivers bid off the negroes at five hundred dollars.

There was some conflict in the testimony, as to the value of the negroes, some testifying that Sarah and Harriet were sound, healthy negroes, worth, at the time of the trial, and some years before, \$800 or \$900 each, whilst others testified that they were unsound, diseased, and worth but little.

Before, and at the time of the Sheriff's sale, the defendant, Wright, was going amongst his wife's relatives and friends, endeavoring to get some of them to bid off the negroes, and give him a chance to redeem them, and then have them settled on his wife and children.

Rivers let the defendant take the negroes home after the sale, in order to give him a chance to see if some of his friends could not be induced to pay the money and still give him an opportunity to redeem them.

The plaintiff being persuaded to do so by his mother, and by his sister, Mrs. Wright, and by the defendant himself, (who promised that if the plaintiff would buy the negroes from Rivers, he would redeem them in a short time, at a fair price,) bought the negroes from Rivers on the 4th of May, 1841, at the sum of eight hundred dollars, which he paid in money that was at a discount, and the whole eight hundred dollars less the discount, which was ten per cent., was credited upon the fi fa against Wright, Flournoy and Rivers.

The negroes still remained in possession of the defendant, until some time in the year 1849, when the plaintiff transferred his title from Rivers to one Addison A. Wooten, the negro woman, Mary, then having five children, to-wit: Sarah, Harriet, Ann, (the negro in dispute) Caroline and Jane.

The negroes still remained in the possession of the defendant until the 24th of December, 1851, when Wooten re-conveyed said negroes to the said plaintiff, together with a negro boy child named Henry, born after the transfer from plaintiff to Wooten. This conveyance was executed in the presence of the defendant who was an attesting witness to the deed.

In the year 1852, the plaintiff took Sarah and Harriet home with him.

On the 9th of March, 1853, the plaintiff executed a deed of gift conveying Mary and her child, Henry, to his sister, Mrs. Elizabeth L. Wright, wife of the defendant, for her sole and separate use, and to the heirs of her body forever, appointing the defendant trustee to carry out the purposes of the deed.

On the same day the plaintiff also executed a deed of gift conveying to his niece, Martha Caroline Wright, the negro girl, Caroline, and her increase.

A short time before this suit was brought, plaintiff demanded the negroes in dispute, and defendant refused to give them up.

The negro girl, Ann, and her child, were shown to be worth \$1,500, and for hire, \$50 per annum.

There was some conflict in the testimony as to the value of Sarah and Harriet at the time plaintiff took them home. several witnesses testifying that they were sound, and worth \$800 or \$900 each, and others testified that they were unsound and comparatively worthless.

During the trial the plaintiff proposed to prove the value of the negroes given by him to Mrs. Wright and her daughter, Miss Martha Caroline Wright, which, being objected to by defendant's counsel, was repelled by the Court, and plaintiff excepted.

When Addison A. Wooten was offered as a witness for defendant, counsel for plaintiff objected to his testifying, on the ground that he was the husband of one of the daughters of Mrs. Wright, by the defendant, and was incompetent, although he had released his interest in the property; which

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objection was overruled and the witness allowed to testify, to which the plaintiff excepted.

The Jury returned a verdict for the defendant.

Whereupon, counsel for the plaintiff moved for a new trial, on the following grounds :

1. Because the Court erred in refusing to let counsel for the plaintiff prove the value of the slaves given by plaintiff to Mrs. Wright and her daughter.

2. Because the Court erred in permitting the witness, Addison A. Wooten, to testify in said case.

3. Because the Court erred in refusing to charge the Jury, that if the negroes went into the possession of the defendant, under a parol gift to his wife and children, of which Rivers had no notice, and Rivers gave the defendant credit on the faith of said negroes, then the gift was void as against said Rivers.

4. Because the Court failed to charge the Jury, that if the trust deed, made by Joseph Wright, was made to hinder, delay or defraud creditors, it was void as against such creditors, the Court not being requested so to charge, but the question being argued before the Jury.

5. Because the Jury found contrary to Law and evidence.

6. Because the whole, and every part of the Judge's charge was contrary to Law and unwarranted by the evidence, which charge is as follows, to-wit :

"When Rivers purchased the negroes which were sold as defendant's property, at Sheriff's sale, he purchased the title which the defendant had and no more. If the defendant had a good title, the purchaser got a good title. If the defendant had no title, the purchaser got none. If Joseph Wright sent the negroes, Mary and Sarah, to the wife of defendant, unexplained, and without imposing any conditions or restrictions upon the gift, the Law presumes it to be an absolute gift to her, and the title to the negroes vested absolutely in her, and in her husband, by virtue of his marital rights, but he had the right to impose upon the gift of the negroes whatsoever conditions and restrictions he saw proper ; and if he gave them to the wife and children of the defendant, such gift vested no title to the negroes in the defendant. If the terms of that gift were afterwards reduced to writing, and if, by the deed, the negroes were given to Elizabeth L. Wright and the heirs of her body, by Charles

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W. C. Wright, the defendant, that was a gift to a specified and designated class of persons, and was not obnoxious to the objection of being an attempt to create an estate tail, in the heirs generally, of the body of Elizabeth L. Wright; and not being an estate tail, it was equivalent to a gift to Elizabeth L. Wright and her children, by Charles W. C. Wright, and, as such, no title vested in the defendant further than to hold the negroes in trust for his wife and children; and if the defendant had shown such to be the title which he held to the negroes, they were the property of his wife and children, and not his property; and when they were sold by the Sheriff, as his property, the purchaser obtained no title which was sufficient to hold the negroes against the paramount outstanding title of the defendant, as trustee for his wife and children, if he had succeeded in showing such title for them. Defendant also relies upon an agreement by the plaintiff when he purchased the negroes from Rivers, the purchaser at Sheriff's sale, to hold them for the benefit of his wife and children, upon being reimbursed the amount which he advanced to Rivers for them. If such was his agreement, he was bound by it, and if he had been reimbursed, was not entitled to recover the negroes sued for; and if he had not been reimbursed, he was entitled to recover them, if the defendant had a good title to the negroes when they were sold by the Sheriff as his property. If the defendant had no such title at that time, Rivers conveyed no title to the plaintiff which would entitle him to recover; and whether the negroes, Harriet and Sarah, were taken by the plaintiff in satisfaction and payment of the amount which he advanced to Rivers, was a question for the Jury to determine according to the proof.

The presiding Judge overruled the motion and refused the new trial, and this decision is the error alleged in this case.

DOYAL & CAMPBELL, for the plaintiff in error.

ALFORD, BECK & ATKINS, for the defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

The evidence shows that the plaintiff in error (who was also the plaintiff below) derived title to the mother of the

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slave, the subject of this suit, from the defendant. The mother, Mary, and two elder children, were seized in the year 1840, under execution, by the Sheriff of Jasper county, as the property of the defendant, sold, and purchased by one Rivers, the assignee of the execution. Rivers agreed with the defendant, to allow him or any friend of his, to redeem the slaves, thus sold, and permitted them to remain in defendant's possession. At the pressing solicitation of defendant and his wife, (plaintiff's sister,) plaintiff purchased them of Rivers, still leaving open to defendant the privilege of redeeming them for the benefit of his wife and children, and suffering them to remain in defendant's possession. This purchase, by plaintiff, was in 1841, and the price paid eight hundred dollars. The girl, Anna, now sued for, has been born since. Mary and her children had been in defendant's possession, he expressing acts of ownership over them, since 1836 or 1837, and paying taxes for them, and generally considered the owner. During this interval the debt for the satisfaction of which they were sold, was contracted. This was plaintiff's title. The defendant pleaded the general issue, and the Statute of Limitations. The latter plea seems to have been abandoned, and indeed it would be strange if it were insisted upon, under the evidence.

Under the general issue, defendant has set up two separate and distinct lines of defence—the one referring to matters anterior to the Sheriff's sale, at which Rivers, the vendor of plaintiff, purchased, denying that plaintiff ever had title; and the other, depending upon transactions subsequent to that sale—admitting that plaintiff acquired title, but subject to a conditional defeasance, which, he says, has become absolute.

It becomes necessary to consider each of these defences. The first rests upon the fact that the woman, Mary, never was the property of defendant, but came to his possession by virtue of a gift from the father of defendant, to defendant's wife and children. This is sought to be established by Joseph Wright, the father. He testifies that the woman, Mary, was his property, and that about the year 1836 or 1837, she went from his possession to that of defendant, in trust, as a gift to his wife and children, and not to him, defendant. He further says: "I parted with the title to said negro verbally, when first sent to defendant's house."

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Subsequently he says: "Defendant's son, a little boy, came after her, and I sent her, as a gift, to defendant's wife and children." This, then, was the time and the occasion when he parted with the title; and the only representative of the other party to the gift, present at its consummation, was this little boy, a mere messenger, the servant of defendant, sent to fetch her. By this juvenile messenger she passed into the possession of defendant, who afterwards used and controlled her (as other witnesses testify) as his own, and as he paid taxes for her. All outward, visible signs indicated to the world that she was his absolute property. There was no witness to the gift. The donor, himself, testifies to no use made by him, constituting a trust in defendant. It does not appear whether the gift was of a life-estate to defendant's wife, with remainder to her children, or to herself and children then in life, as tenants in common. All is vague and uncertain, except the delivery, which was to the defendant. So the matter rested, to the entire satisfaction of the parties, until 1839, two or three years after, when Anthony Dyer had sued defendant for a debt of several thousand dollars, and shortly before the rendition of judgment, when rendered, would bind the whole of defendant's property. The defendant then drew a deed, purporting to be a conveyance of the slave, Mary, and a child of Mary, (do not less born after the verbal gift) to the defendant, in trust for his wife and children. This deed, which is mainly relied upon on this branch of the case, to defeat plaintiff's title, bears date, 19th September, 1839, and the Judgment upon which Mary and two children were afterwards sold, bears date in January, 1840. Counsel for defendant in error bestowed much argument upon this deed, and read many authorities to show that it was a valid conveyance to wife and children, in trust, he taking no interest under either by its terms, or by operation of Law, in virtue of marital rights. We deem it unnecessary to enter upon that investigation, believing the deed to be *dehors* the case. At the time of its execution, the pretended donor, as appeared by his own testimony, was without title, and, therefore, could convey none. He swears that he "parted with the title said negro when first sent," which was in 1836 or 1837. He then parted with the title, somebody then acquired it. This branch of the defence must depend upon the ver-

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gift. Scrutinizing the testimony touching that gift, we are constrained to hold, that it passed title to the defendant, to whom the delivery (which is the only part of the *res gesta* that is clear and unequivocal,) was made. To allow the donor, by his testimony, after an interval of twenty-two or three years, when he had attained the age of four-score and five years, to engraft upon a parol gift, trusts, not declared at the time, so far as the evidence discloses, and never heard of until the danger became imminent that creditors, who doubtless trusted the defendant upon the strength of his visible property, would be to establish a most dangerous precedent—to invite men in failing circumstances to fraudulent devices—in prejudice of the rights of *bona fide* creditors. The defendant, himself, who has been the active agent in shaping the curious history of this property, during more than a quarter of a century, and who perfectly understood the character of the parol gift, knew, and felt, that it would be an unsafe reliance to wrest the property from the grasp of creditors, and therefore resorted to the expedient of procuring a written deed from his aged father.

Our conclusion, from the evidence, is, that the title to Mary rested in the defendant when she went into his possession; that Rivers acquired a title to her and the two children sold with her, by purchase at Sheriff's sale; and that the plaintiff acquired title in them by purchase from Rivers. This brings us to the consideration of the second branch of the defence. It is contended that, at the time of plaintiff's purchase, he agreed, whenever he should be reimbursed the price paid, with the interest thereon, to make some conveyance of the property for the benefit of the wife and children of defendant, and this is not denied. All this occurred in the year 1841. I leave out of view the conveyance to Wooten, and his re-conveyance to plaintiff, both having been, by common consent, and nobody attaching any consequence to them, in the conduct of the case.

Defendant maintains that plaintiff has been reimbursed his outlay, and the interest upon it; yet he does not pretend that one dollar in money has been paid to plaintiff. These are the facts relied upon to show that plaintiff has been reimbursed. From the year 1841, when plaintiff purchased, until 1853—a period of twelve years—these slaves were permitted to remain in defendant's possession, plaintiff deriv-

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ing no benefit from them, his outlay accumulating interest, and no part of it reimbursed. The question occurs here, how long, under this agreement, was he to remain un-reimbursed, and dispossessed of the property? The ready answer would be, not beyond a reasonable time—for it would be a most convenient and desirable arrangement to the defendant to postpone him indefinitely. Then, was twelve years a reasonable time? This question will scarcely admit of a negative answer. At the expiration of the reasonable time, what was his legal right? To demand and recover the price paid, and interest upon it; or, in default of that, to terminate the defendant's possession, and reduce the property to his own possession.

In 1853, failing to procure payment, he conveyed, in trust, for the benefit of his sister, defendant's wife, two of the slaves; and to her daughter, Caroline, one of them. He took home with him two of them—no one disputing his right to do all this. But he leaves one of them, Anna, undisposed of by gift, and unreclaimed by himself—leaves her, as they had all been, for twelve years.

Thus things remain until 1859—six years longer—when plaintiff makes of defendant, a demand for Anna, the subject of this suit, which is met by a refusal to deliver her, and this suit is instituted.

Defendant insists, first, that at the time plaintiff conveyed some of those slaves to his wife and child, in 1853, he received the two whom he took home, as a satisfaction of his claim for reimbursement, but the record contains no evidence that he did so.

He then insists that they were, in value, a full reimbursement of his outlay and interest, and that he can claim no more. Evidence has been offered on both sides to show the value of these slaves, and the witnesses estimate their value very differently. But, in our opinion, this is no defence against the legal title of plaintiff—certainly none, in a Court of Law. If resistance can be successfully made under these circumstances, to plaintiff's title, it may not be by this defendant, nor in the forum from which this case comes to us. If reimbursement of the price he paid for the negroes, with interest accrued, was by his agreement to separate a defeasance of his title, then, in a Court of Law, a party setting up such a defeasance must prove payment, or tender of the

money, or the explicit acceptance, by the plaintiff, of some value in lieu of it. None of these have been proven.

Again : this is not strictly a defeasance. Plaintiff's agreement was, not that upon the payment of the money the negroes should become the property of defendant, who now resists his title, but that, upon such payment, he would, by some proper conveyance, secure the property to defendant's wife and children. Even had he accepted the two as full reimbursement, he would be entitled to demand and recover the remainder from defendant, to the end that he might convey and deliver them in compliance with his agreement. We are clear that if, under the facts of this case, any rights can be asserted against plaintiff's title, they are mere equities, and cannot be set up as a defence to this action at Law.

On the trial, the Jury found for the defendant, and the plaintiff moved for a new trial on several grounds, viz : That the Court erred in overruling his objection to the competency of Wooten as a witness—in refusing to allow plaintiff to prove the value of the slaves given by plaintiff to defendant's wife, and to one of their children, in 1853—and in the charge to the Jury—and that the verdict was contrary to Law and evidence. The Court overruled the motion, and error is assigned upon the grounds of that motion.

We have not sufficient data to determine the competency of Wooten as a witness. He was doubtless incompetent, without a relinquishment of his interest. It seems he did relinquish, but his relinquishment is not in the record, and without a view of it, we will not attempt to adjudicate its sufficiency. The pertinency of the evidence, showing the value of the slaves conveyed by plaintiff, in 1853, is not apparent to us, and we cannot, therefore, see that the Court erred in rejecting it. The errors imputed to the Court and Jury, appertain to the merits of the case, and it will be sufficiently apparent, from the view we have taken of the case, that there was error in the charge and the verdict, and in what the error consisted, without more minute examination of the several grounds taken in the bill of exceptions.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court,

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that the Judgment of the Court below be reversed, and a new trial be granted, on the ground that the verdict of the Jury was contrary to Law, and strongly and decidedly against the weight of evidence.

CONE vs. FORCE.

The presumption of Law is against the freedom of negroes, held in servitude; and if the plaintiff, in a Possessory Warrant, make a *prima facie* case of rightful possession of negroes, it is not competent to the Magistrates' Court, before whom such warrant may have been returned for trial, to hear evidence of and to adjudicate the freedom of such negroes.

Certiorari, in Floyd Superior Court. Decided by Judge HAMMOND, at the July Term, 1860.

On the 24th of January, 1850, Gilbert Cone made an affidavit before one James P. Perkins, a Justice of the Peace: "That, on the 19th of January, 1860, a certain negro woman, named Sarah, and her three children, Lydia, Rose and Jenny, having been recently in the legally and peaceably acquired possession of the said Cone, were taken and carried away from his said possession, without his consent, by fraud, violence, seduction, or other means, having disappeared without his consent, and, as the said Cone believed and knew, had been taken possession of, and carried away and harbored by Charles O. Force, under some pretended claim and without lawful warrant or authority, and that said Cone *bona fide* claimed the right to the possession of said negroes."

Upon this affidavit a warrant issued, and the said Force was arrested, and said negroes seized and brought before James P. Perkins and Duncan M. McCurry, Justices of the Peace, for a hearing.

On the trial of the matters involved in the said warrant,

the plaintiff proved that the negroes were in his possession just before the defendant obtained the possession of them, and that the plaintiff was exercising acts of ownership over the negroes; that he had paid taxes on them for three or four years.

The defendant then proved that George S. Black had seen a small negro girl in the possession of Mrs. Cone, which was said to be the child of a certain white woman, but not knowing the woman mentioned in the warrant, the witness could not say whether she was the one or not.

The defendant, also, introduced Alvin Dean, to prove that the negroes were free, according to what the said Gilbert Cone had said.

Counsel for Cone objected to the testimony of Black and Dean both, but the Justices overruled the objection and admitted the testimony.

The defendant then offered in evidence an order of the Superior Court of Floyd county, passed on the 19th of January, 1860, appointing Charles O. Force guardian of the said negro, Sarah, and her children, which order was granted upon the petition of Messrs. Underwood & Smith, Attorneys for the said Sarah.

Counsel for Cone objected to this testimony, but the objection was overruled and the testimony admitted.

The testimony having closed, the Justices ordered and adjudged that the negroes named in the warrant, be given to, and remain in the possession of, the said Charles O. Force, he giving bond in the sum of six thousand dollars, in terms of the Statute in such case made and provided.

The plaintiff, Cone, then applied for and obtained a Certiorari, directing said Justices to certify and sent up the proceedings in said case to the Superior Court, that the errors alleged might be corrected.

The Justices answered the foregoing facts, and upon the hearing, the presiding Judge dismissed the Certiorari, and that decision is the error now complained of.

PRINTUP, for the plaintiff in error.

SHROPSHIRE, by T. W. ALEXANDER, for the defendant in error.

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By the Court.—JENKINS, J., delivering the opinion.

This case was instituted by Possessory Warrant, sued out by the plaintiff in error, against the defendant and certain negroes, under the Act of 1821. On return of the warrant, and trial of the right of possession, plaintiff made a *prima facie* case, entitling him to have the negroes restored to his possession. Defendant offered in evidence of the freedom of said negroes, and of a proceeding before the Superior Court of Floyd county, wherein he, defendant, was appointed their guardian. To this evidence, plaintiff objected, but the Court overruled the objection and admitted the evidence. Plaintiff excepted.

The Magistrates' Court ordered the negroes into the custody of the defendant, recognizing their freedom and his guardianship. Plaintiff excepted.


The Superior Court of Floyd county, having acquired jurisdiction of the cause, by Certiorari, affirmed the decisions of the Magistrates' Court, and dismissed the Certiorari. Plaintiff excepted, and the decision of the Superior Court is now under review. We hold that the Court below erred in sustaining the decision of the Magistrates' Court, on the objection to the admissibility of evidence of the freedom of said negroes, and its Judgment, recognizing their freedom.

It was not competent for the Magistrates' Court to entertain and adjudicate the question of the freedom of said negroes in this proceeding. The General Assembly has formally and distinctly provided, both the proceeding by which, and the forum in which, the status of negroes held in slavery, but claiming to be free, shall be investigated and determined. *Cobb's Digest.*, 1007 and 1011. When held in servitude, and before their freedom shall have been established in the form, and by the forum thus designated, the presumption of Law is against their freedom.

The plaintiff made, as already remarked, a *prima facie* case. The defendant offered no proof, to show how he acquired *possession*. This, the right of possession—not title—not the social status—was the legitimate subject of inquiry.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court.



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of the Court below be reversed, on the ground that the Court erred in refusing to correct, by final judgment, the following errors of the Court below. First. In admitting on the trial of the case evidence of retaining possession of negroes in freedom. Second. In adjudicating the case on slavery under this proceeding. Third. In ordering said slaves into the possession of the plaintiff by warrant.

GOGGANS vs. MONROE.

1. On the trial of an action for malicious prosecution, (Arson being the criminal charge,) it was not error in the Court to permit the defendant to prove that the plaintiff had threatened to destroy the house, for the burning of which plaintiff had been prosecuted, without first proving that defendant had been informed of such before he commenced the prosecution.
2. Defendant's counsel on the trial, having argued to the Jury that plaintiff's character was bad, it was error in the Court to refuse to charge, on request, that the Law presumes the character of a party to be good until the contrary is proven.
3. In an action on the case for malicious prosecution, where there is evidence of express malice—an *alibi* proven by the plaintiff—evidence that the prosecutor had been informed, before he commenced the criminal prosecution, that proof of the *alibi* existed—an actual arrest of plaintiff and restraint of his personal liberty—a bill preferred charging him with a felony, and a return of "no bill and malicious prosecution"—a verdict for defendant is contrary to Law and evidence, and it is error in the Court to refuse a new trial.

Case, in Haralson Superior Court. Tried before Judge HAMMOND, at the April Term, 1860.

This was an action, brought by Andrew J. Goggans against Duncan Monroe, to recover damages, which the plaintiff alleged he had sustained, by reason of a malicious prosecution

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for the offence of Arson, instituted against him by the defendant.

The testimony adduced on the trial of the case in the Court below developed the following facts, to-wit:

The plaintiff was arrested, under a warrant issued by a Justice of the Peace, at the instance and upon the affidavit of the defendant, and was recognized to appear at Paulding Superior Court, to answer for the offence of Arson.

At the January Term, 1849, of Paulding Superior Court, a Bill of Indictment for the offence of Arson was preferred before the Grand Jury, at the instance of the defendant, as prosecutor, against the plaintiff, which indictment was returned by the Grand Jury "No Bill and a Malicious Prosecution."

The presiding Judge of said Paulding Superior Court then passed an order, discharging and acquitting the plaintiff of and from said offence of Arson and giving him copy bill.

Jeremiah Thompson was a Justice of the Peace, and was called upon to sit on the committing Court, when the plaintiff was arrested for the offence of burning a school house, then in Paulding county, but defendant objected to Thompson sitting upon the case, saying at the time, that he, the defendant, intended to convict the plaintiff of burning the school house, right or wrong; the defendant, also, on the day of the trial before the Justices, objected to giving the plaintiff any more time to procure witnesses in his behalf.

On the night that the school house was burnt, the plaintiff was at home, and up until between midnight and day, and then went to bed and was in bed next morning.

This fact was sworn to, by three or four witnesses who stayed all night at his house, and the defendant was told of this fact before he preferred the Bill of Indictment.

The defendant proved that plaintiff was a subscriber to a school in Paulding county, and the persons interested in the school met for the purpose of electing trustees; the name of the plaintiff, who had assisted in building the school house, was stricken from the school articles, and the other persons would not let him vote for trustees, and said: that, on account of some difficulties between the plaintiff's children and others, the year before, he, the plaintiff, should not send to the school; whereupon the plaintiff said: that one-ninth part of the school house belonged to him, and if he was not

suffered to send to school, he would destroy it: and the house was destroyed.

Plaintiff's counsel objected to this testimony, unless the defendant's counsel would undertake to show, that a knowledge of these threats, to destroy the school house, was brought home to defendant before he prosecuted plaintiff, but the Court overruled the objection, and plaintiff excepted.

Defendant also introduced the answers of George Goggan to interrogatories taken out in the case, to prove that, on the day after the school house was burnt, plaintiff said he was glad of it, and pulled from his pocket a box of matches, and said that he had obtained them for the purpose; but the witness, in the same answer, proves that the plaintiff was at home on that night, and in answer to two other sets of interrogatories, one before, and the other after, he testified about the box of matches, he swore that he did not testify about the matches, and that defendant had offered him a gun worth twenty-five dollars, to swear in his favor in the case, and that he was with the plaintiff, on the night the school house was burnt, until three o'clock in the morning.

In the argument before the Jury, the defendant's counsel insisted that the plaintiff's character was bad, whereupon counsel for the plaintiff requested the Court to charge the Jury that his character was presumed to be good in the absence of testimony to the contrary.

The Jury returned a verdict in favor of the defendant.

Counsel for the plaintiff moved for a new trial of said case, on the following grounds, to-wit:

1. Because the Court erred in admitting in evidence the threat of the plaintiff, to burn the school house, to show probable cause for the prosecution, there being no evidence that the defendant knew of that threat.

2. Because the Court erred in not charging, as requested by plaintiff's counsel, that the Law presumed the plaintiff to be of good character until the contrary was shown by proof.

3. Because the Jury found contrary to the evidence.

4. Because the Jury found contrary to Law and the weight of evidence.

The presiding Judge refused the new trial, and the Writ of Error in this case brings that decision up for review, and asks a reversal of the same.

Goggans vs. Monroe.

W. W. & H. F. MERRELL, by GLENN, for the plaintiff in error.

No appearance for the defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

Was the Court below right in refusing the plaintiff a new trial?

1. We find no error in the admission by the Court of evidence of a threat made by plaintiff, to destroy the school house, which, after the threat, was really burned, even though knowledge of that threat was not brought home to defendant before he commenced the prosecution. It was an important fact in the case, which might have come to defendant's knowledge before he commenced the prosecution, though not so proven. It was a fact, tending to show probable cause, though its effect was certainly weakened, in that view, by defendant's failure to prove at what time he acquired knowledge of the fact. It was, moreover, a circumstance deserving consideration of the Jury, in determining the important question, whether plaintiff did burn the school house, and was, we think, properly submitted to them.

2. Defendant's counsel having argued that plaintiff's character was bad, and this argument being likely to prejudice his case before the Jury, he was entitled to the legal presumption that, in the absence of evidence proving the contrary, his character was good; and it was error in the Court to refuse to charge, on request, that the Law did so presume.

3. On the trial, the plaintiff proved an *alibi*, by three or four unimpeached witnesses, and further, that defendant was informed of the existence of such proof before he commenced the prosecution. Defendant declared his intention to commit plaintiff, right or wrong—caused him to be arrested, thereby restraining his personal liberty—on the preliminary examination, objected to plaintiff having time to procure additional evidence, and, finally, caused a bill, charging plaintiff with Arson, to be preferred before the Grand Jury. That body, under an *ex parte* investigation, returned, "No Bill, and a Malicious Prosecution." We are decidedly of opinion, in view of all the evidence, that there was an absence of probable cause, Malice on the part of the prosecutor, and

damage to the plaintiff in error. If so, then the verdict was contrary to Law and evidence, and the Court erred in not granting a new trial.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, and a new trial ordered, on the ground that the verdict of the Jury is contrary to Law and strongly and decidedly against the weight of evidence.

JOHNSON, MITCHELL & CO. *vs.* DURHAM,
ALLING & CO.

1. If no plea is filed at the appearance-term, the case—under the Judiciary Act of 1799—is in default, and the Court has a right, if it be insisted upon, to require the cost to be paid before the default can be opened.
2. If the general issue, or any other plea, has been filed, and the defendant claims the right to amend his answer by filing an additional plea, the Court has the right to exact the cost as the price of this privilege and to reject the plea, if it be not paid.

Complaint, in Floyd Superior Court. Tried before Judge HAMMOND, at the July Term, 1860.

Durham, Alling & Co. brought suit, in the Inferior Court of Floyd county, against Johnson, Mitchell & Co., in which Court a verdict was rendered in favor of the plaintiffs for the sum of \$230.

From this verdict the plaintiffs entered an appeal to the Superior Court.

There was no plea in writing filed in said case, although the names of D. R. Mitchell and A. R. Wright were marked

Johnson, Mitchell & Co vs. Durham, Alling & Co.

on the docket as Attorneys for the defendants, and a set of interrogatories had been taken out by plaintiffs, and served upon and crossed by said Mitchell, as defendant's Attorney, which interrogatories were read, and on the trial the answers thereto were the only evidence to prove a part of plaintiff's demand; and said case had been once continued by the defendants through the said Mitchell and Wright, as Attorneys.

When the case came up for trial on the appeal, the said defendants proposed to defend said case, through their said Attorneys, Mitchell and Wright, which the presiding Judge, (on objection being made thereto,) refused to permit, unless the default was opened, by the defendants paying the costs of said case, and pleading instanter to the merits of the action.

This decision is the error complained of in this case.

A. R. WRIGHT, for the plaintiffs in error.

D. S. PRINTUP, for the defendants in error

By the Court.—LUMPKIN, J., delivering the opinion.

The suit in this case was originally brought in the Inferior Court, and carried up, by appeal, to the Superior Court. The name of defendants' counsel was marked on the Bench-Docket of the Inferior Court; but no plea, not even the general issue, was ever filed in the case. The Judge held that the case was in default, and would not allow an appearance under the Common Law rules of practice until the cost was paid. The case was submitted to the Jury, *ex parte*, by the plaintiffs and, upon proof of their demand, a verdict was rendered for the amount of the account. A new trial was moved for and refused, and the case is brought to this Court for correction.

By the Judiciary Act of 1799, an answer has to be filed at the appearance-term of the Court. In some of the Circuits, the general issue is always considered as filed, and it is insisted that this is true in the Tallapoosa Circuit. The Judge, by his ruling, ignores any such practice.

But, suppose this were so. Counsel state that they expected to file a plea of set-off. This amendment they had a right to make. But, then, under the same Act which gives

Tatum *et al.* vs. Allison, Anderson & Co.

them this right—the Statute of 1853 and 1854—the Judge had the co-relative right of not only requiring the cost to be paid, but prescribing such other terms as he, in his discretion, might see fit to impose. If the defendants refused to comply with the only terms proposed, namely: the payment of the cost, it was the right of the Court to reject their plea, if indeed they had offered any, which they did not.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

TATUM *et al.* vs. ALLISON, ANDERSON & CO.

1. A Writ may be signed by an Attorney in fact of the plaintiffs.
2. Where the signing of the declaration is imperfect, it is curable, even under the Act of 1818, provided there be a good cause of action set out in the declaration. The time for such trifling is past.

Complaint, in Dade Superior Court. Decision made by Judge WALKER, at the May Term, 1860.

Allison, Anderson & Co. brought an action in the Jones' form, against Robert H. Tatum, maker, and Emanuel Mann, endorser.

The Writ of the plaintiffs was signed by "H. L. W. Allison, Attorney in fact for Allison, Anderson & Co.," said H. L. W. Allison being at the time Deputy Clerk of said Court. At the appearance term of the case, a motion was made by counsel for the defendants to dismiss said case, on the ground that the Writ, or petition, of the plaintiffs was not signed by competent authority.

The presiding Judge overruled the motion, and refused to

Tatum et al. vs. Allison, Anderson & Co.

dismiss the case, but permitted the name of H. L. W. Allison to be erased, and the name of Leander W. Crook, an Attorney at Law for the plaintiffs, to be substituted in lieu of that of the said Attorney in fact.

This decision is the error complained of in this case.

No appearance for the plaintiffs in error.

CROOK, represented by J. A. GLENN, for the defendants in error.

By the Court.—LUMPKIN, J., delivering the opinion.

The Writ in this case was signed by an Attorney in fact, for the plaintiffs. His power was not disputed. Upon objection being made, the Court allowed the name of the Attorney at Law to be substituted.

We think, the Writ was right as it stood. What act cannot be done by an Attorney in fact? A deed to land can be executed by another—why may not a declaration be signed, provided authority be given for that purpose? And here, no question is made as to the sufficiency of the power.

But even if this were not so, the amendment was allowable. An attempt had been made to sign the Writ. If the declaration contained a good cause of action, that and every other formal defect was amendable, even under the Act of 1818. The time for such trifling is past.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

JACKSON, COOK & CO. *vs.* HOLLAND.

It would seem that the weight of authority, English and American, is, that a livery stable keeper, at Common Law, has no lien—it may be acquired, however, by special contract.

Motion to distribute money, in Whitfield Superior Court. Decided by Judge WALKER, at the May Term, 1860.

This case came up and was heard upon the following state of facts, to-wit :

Joseph McDowell placed a certain grey stallion horse at the livery stable of Jesse Holland, in the town of Dalton, where said horse was fed, kept and cared for, for a period of thirteen months. McDowell rode and used the horse when he wished to do so, and in the spring of 1856, James Holland stood the horse for three months, and for that time paid his board. Jesse Holland charged McDowell ten dollars per month for keeping the horse. Some time in the last of 1856, or the first of 1857, McDowell removed from Dalton to Loudon, Tennessee, and left the horse with Jesse Holland, to be delivered to Morgan & Mitchell, at a certain price, if they called for the horse; and if Jesse Holland sold the horse, to pay himself for keeping him out of the price he brought. Jesse Holland understood, from the arrangement, that the horse was left with him as security for what was due for keeping him. Jackson, Cook & Co. sued out an attachment against McDowell, which was levied on the horse, whilst he was in possession of the said Jesse Holland, under the arrangement aforesaid. By an agreement between the parties, the horse was sold as perishable property, under the provisions of the Attachment Laws of Georgia, and the money arising from the sale was preserved, to be disposed of by order of the presiding Judge, at the May Term of Whitfield Superior Court.

The question was, whether Holland, as a livery stable keeper, had a lien as such upon the horse, for feeding and taking care of him; and if he did not have such lien, did the understanding and arrangement under which the horse was left with him, create a lien?

After argument had, His Honor Judge Walker decided:

1st. That Holland, as a livery stable keeper, was not enti-

Jackson, Cook & Co. vs. Holland.

tled to a lien upon the horse, or the proceeds of the sale of the horse.

2d. But that, under the agreement between him and McDowell, Holland did have a lien, and was entitled to the payment of what was due him for keeping the horse, out of the proceeds of the sale.

This decision constitutes the error assigned in this case.

JACKSON, for the plaintiff in error.

J. A. GLENN, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

It seems that the horse levied on and sold under the attachment of Jackson, Cook & Co., against Joseph McDowell, was put at the livery stable of Jesse Holland, and, after being kept there some time, Joseph McDowell removed to the State of Tennessee, when this attachment was levied. Before leaving, he stated to Holland that he was on a trade with Morgan and Mitchell for the horse, and if they came, to let them have him at a certain price, and to pay himself out of the money. It was the understanding of Holland, as he swore, that he was to hold the horse as security for his debt.

The property being of a perishable nature, and it being expensive to keep the horse, it was agreed that he should be sold, and the Judgment of the Court taken as to the priority of the conflicting liens upon the proceeds.

His Honor, Judge Walker, held, that at Law, the livery keeper had no lien, but that Holland was entitled to be first paid out of this fund, by virtue of the special contract, and this decision is excepted to and brought here for revision.

Does a lien exist in favor of livery keepers, at Common Law? This question has been much discussed, both in England and in this country, and contrary to the understanding of many, in and out of the profession, I am bound to say, the weight of authority, on both sides of the Atlantic, is against the lien. (*See 67 Eng. Com. Law Rep. 498; 5 M. & W. Exch. Rep. 341; Gainnell vs. Cook, 3 Hill's N. Y. Rep. 341.*) The whole doctrine is elaborately discussed, and all the English cases carefully considered in the

New York case. And the conclusion to which the Court came, was that the old doctrine of the Common Law, that livery stable keepers had no lien, unless there be a special contract to that effect, remains unshaken.

One of the reasons is, that where horses are kept at livery, the owner takes and uses them at pleasure, whereas, a bailee only has a lien so long as he retains the uninterrupted possession. If the owner gets the property in his hands without fraud, the lien is at an end, and it will not be revived by the return of the goods.

This doctrine does not extend to inn-keepers who are not only obliged to keep the horses of their guests, but they become insurers against loss, by larceny or otherwise, whereas a livery-keeper may take or refuse a horse as he may see fit, and he is only responsible for ordinary care; and, in these respects, there is found a strong reason why they are not put upon the same footing with inn-keepers and carriers, as to the right of lien.

The doctrine disallowing a lien does not extend to a bailee, for hire, who, by his labor and skill, has imparted additional value to the goods. Nor has it been extended to the trainer of a horse—the breaker of a colt or wild horse—nor to a farmer or stable keeper who receives a mare to be covered by a stallion, on account of the increased value, by reason of the foal. Neither does it apply to warehouse-men, mechanics of any description, who repair your furniture, make your clothes, nor even to the blacksmith who shoes your horse.

Whether these distinctions be well taken, (and are not some of them, at least, rather artificial in their reasoning?) I will not say. We will not—because we need not—pronounce an authoritative judgment upon this point. Any livery-keeper who has a popular representative in the Legislature, can readily procure an act to be passed giving this lien, and I do not say it would be wrong.

2. Was the Court right in ruling that Holland was entitled to his lien, under the special contract? We think so. The horse was left in his custody, as a pledge for his pay, as well for the past as his future keep and care. The defendant directed him to pay himself out of his price or proceeds. Could McDowell, himself, after thus pledging the horse, take him out of Holland's possession without paying him?

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We hold he could not. But, be this as it may, under the implied contract, whenever the horse was sold, Holland was entitled to be paid his debt. (1 *Parsons on Contracts*, 592, and *Noteo. Gibson vs. Boyd*, 1 *Kerr's N. R. Rep.* 150.)

We affirm, therefore, the Judgment of the Court below, on the second ground.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

CROSS vs. PAYNE.

An injunction will be refused on the coming in of the answer, if the equities are fully denied.

In Equity, in Dade Superior Court. Decision by Judge WALKER, at the May Term, 1860.

Joel Cross prepared his bill in Equity in due form, the principal allegations of which are as follows, to-wit:

On the 10th of December, 1859, the complainant bought a negro boy, by the name of Wash, from one Larkin Payne, which negro boy the defendant, Larkin Payne, represented to be a sound, healthy and able-bodied negro, capable of doing good work and service as such; but that as the negro had had a short spell of sickness, he preferred not to give a written warranty of soundness in the bill of sale; that complainant, confiding in such representations of soundness made by said Payne, together with the assurance that said negro had not been ruptured, and was free from *hernia*, or other disease, accepted a bill of sale of said negro, without any clause warranting said negro sound; that he was induc-

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ed to accept such bill of sale on account of his confidence in said Payne, and because he believed that his said representations and assurances were true; that complainant gave to said Payne his note, due the 25th of December, 1859, for twelve hundred dollars, which was the purchase price of said negro, as agreed on by complainant and the said Payne; that for the purpose of securing the said Payne against loss, on account of a failure of complainant to pay said note punctually, the complainant gave to said Payne another note, for fifty dollars, also payable on the 25th of December, with the distinct understanding and agreement, that if the first note was punctually paid, the fifty dollar note was to be void and delivered up to the complainant; that for the purpose of making said Payne easy, and perfectly secure as to the final payment of the said purchase price of said negro, the complainant also proposed and agreed to give to the said Larkin Payne, a lien upon a negro boy belonging to the complainant, by the name of Allen, and suggested that some words creating such lien be put in the twelve hundred dollar note; that said Payne objected to putting such lien in the note, but said that he would prefer it to be written on a separate piece of paper, and would get Mr. Allison to write it; that complainant nor Payne understood such lien to be a mortgage, subject to the summary mode of foreclosure provided by the Statutes of Georgia, but was simply intended as a lien to be enforced in the event of a failure to pay said note, and which would take precedence of any other subsequent lien on said negro, Allen; that complainant verbally authorized Hugh L. W. Allison to sign his name to such lien; that Payne went away, and in violation of the understanding and agreement aforesaid, and for the purpose of defrauding complainant, and getting an undue and illegal advantage, had a regular and formal mortgage drawn up, conveying said negro, Allen, to secure the payment, not only of the twelve hundred dollar note, but also of the fifty dollar note; that complainant bought said negro boy, Wash, for the purpose of selling him again, which the said Payne knew at the time of the purchase, and that such re-sale was complainant's intended and expected means of paying said twelve hundred dollar note, when the same became due, of which the said Payne was aware at the time; that the complainant sent said negro, Wash, off for sale, and spent about

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one hundred dollars for his board, clothing, &c., and failed to sell him, because he was ruptured, and had *hernia*, and other diseases, and was not an able-bodied negro capable of doing good work and service as such ; that said negro, Wash, was thus diseased at the time complainant bought him, and that Payne knew it, and concealed it from complainant, and thus defrauded him in the trade ; that the 3d of January, 1860, the said Payne foreclosed the mortgage, and a *fi fa* issuing from such foreclosure was levied on the negro boy, Allen, on the 6th of January, 1860.

The bill prays the answer of the defendant as to the facts, and also prays an injunction restraining the sale of the negro under the mortgage *fi fa*, and also for general relief.

When the bill was presented to Judge Walker for his sanction, in order to obtain the injunction prayed for, he granted a *rule nisi*, calling upon the defendant, Larkin Payne, to show cause why said injunction should not issue ; and the defendant filed his answer to said bill, and presented the same as a cause why the said injunction should not issue.

The material points of the answer are as follows, to-wit :

The defendant admits that he sold the negro boy, Wash, to complainant, at the time and price stated in the bill, and that the defendant gave his notes as stated ; that defendant having bought land and bound himself to pay for it by the 25th of December, 1859, the fifty dollar note was given to indemnify him for the trouble and expense he would have to incur in obtaining the amount from the Bank, in the event of a failure on the part of complainant to pay the twelve hundred dollars on the day the note therefor matured. The defendant denies any knowledge and concealment from complainant, of the fact that the negro boy was ruptured, or had *hernia*, or other disease, at the time of the trade. He also denies having represented said negro as sound and healthy, as the bill alleges ; on the contrary, it was expressly agreed, and put in the bill of sale, that the complainant should take said negro at his own risk, as to soundness. The defendant also denies the allegations in the bill, as to the lien on the negro boy, Allen, and says that the distinct understanding and contract was, that a regular and formal mortgage was to be executed, and that Emanuel Mann was to sign complainant's name thereto, and that this was done in order to give defendant a summary mode of getting his

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money on both notes if the complainant failed to pay the twelve hundred dollars punctually. Complainant failing to pay the twelve hundred dollars at the time stipulated, the defendant did proceed to foreclose the mortgage, and to have a fi fa issued, as alleged in the bill. About the time the mortgage was being foreclosed defendant met with complainant, and, for the first time, informed defendant that the negro was ruptured, which defendant did not believe, and when, upon examination of the negro, he was found to be ruptured, the defendant, being then for the first time aware of it, proposed to complainant to cancel the trade and take the negro back and give him his notes and mortgage, which complainant refused to do, saying that he had bargained, or could sell said negro for fifteen hundred dollars.

Upon the showing made by the answer, Judge Walker refused the injunction, and this decision is complained of as error.

There was no appearance for the plaintiff in error.

CROOK, by J. A. GLENN, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The equities of the bill, if it ever contained any, have been most fully denied by the answer, and we agree with the Court below, that the injunction should have been refused.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

Chastain vs. Brown.

CHASTAIN vs. BROWN.

The plaintiff brought suit against defendant on account, in which were charged articles as sold to defendant "per Pate" and "per" others. In proof of the account, plaintiff introduced his book of original entries in evidence, and proved that he kept correct books. *Held*, in the absence of proof to the contrary, that the presumption was that the goods so charged were sold to defendant.

Certiorari, in Carroll Superior Court. Decided by Judge HAMMOND, at the April Term, 1860.

William F. Brown instituted suit, in a Justices' Court of Carroll county, against William Chastain, to recover the sum of forty dollars and twenty-four and one-fourth cents, alleged to be due on an account for merchandize.

The account was originally for the sum of fifty-nine dollars and sixty-four and a fourth cents, but Chastain had paid nineteen dollars and forty cents on the account before the suit was brought.

All the items in the account were charged to Chastain, some of them "per self," some of them "per Williams," and some of them "per Pate." The items charged to the said Chastain "per Pate" amounted exactly to the sum left after the payment of the nineteen dollars and forty cents.

On the trial in the Justices' Court, William F. Brown, the plaintiff, introduced his books of account, which were admitted in evidence without objection.

He then introduced four or five witnesses, who testified: That they had had dealings and made settlements with said Brown, and that he was in the habit of keeping correct books.

Upon this evidence, the Jury in the Justices' Court returned a verdict in favor of the plaintiff, Brown, for forty dollars and twenty-four cents.

Chastain then obtained a Certiorari, directing the Justices to certify and send up the proceedings in said case to the Superior Court, alleging: That the "verdict of the Jury was contrary to Law and evidence, because the plaintiff failed to make out a case against him; that the books of themselves, and without other evidence, were not sufficient to charge the defendant with goods delivered to Pate without

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some order or contract that he, the defendant, should be liable to pay for them."

In answer to the Certiorari, the Justices certified the foregoing facts as having been shown by the evidence.

On hearing the Certiorari, the presiding Judge of the Superior Court dismissed the Certiorari and affirmed the verdict and Judgment of the Justices' Court.

This decision is assigned as error.

G. W. AUSTIN, by SIMS, for the plaintiff in error.

W. W. & H. F. MERRELL, by GLENN & COOPER, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The only question made in this case is, whether the books of the plaintiff—they being properly admitted in evidence—were evidence of the defendant's liability for those articles, charged in the account sued on to defendant "*per Pate*" and "*per*" others, whose names appear in the account. We think they were, in the absence of any rebutting proof to the contrary. It is not a fair presumption that those articles were sold and delivered to third persons, or that the articles so charged were the debts of third persons. But the presumption is, that the items are properly charged—that the goods were sold to the defendant, not to the third persons, but delivered to them at the request, or by the directions of the defendant. The evidence is, that the books are correct; if they are so, then those goods were sold to the defendant. If they were not, but sold to the third persons, then the books are not correct, and the onus was on the defendant to show that.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

Thompson vs. Harlow.

THOMPSON vs. HARLOW.

The defendant hired from the plaintiff a horse, to perform a journey. While he had as yet performed but a small part of the journey, the horse was discovered to be sick. Defendant's attention was called to the condition of the horse, who continued his journey, and at the end, the horse died. *Held*, that defendant is liable to the plaintiff.

Case, in Catoosa Superior Court. Tried before Judge D. A. WALKER, at the November Term, 1860.

This was an action, brought by John Harlow against Theron B. Thompson and William L. Witherspoon, to recover damages for a horse, hired by said Harlow to the defendants, and which, the plaintiff alleged, was killed by the careless, negligent and improper driving of said horse in a buggy, by the said defendants.

On the trial of said case, the following testimony was introduced by the plaintiff, to-wit:

In the month of August, 1858, the defendant, Thompson, hired from the plaintiff a roan horse, about six years old, and worth from one hundred and fifty to one hundred and sixty-five dollars, to drive in a buggy from the town of Ringgold to Rock Spring Camp Ground, in the county of Catoosa, a distance of about twelve miles; that Thompson said the horse took sick before he was driven a mile from Ringgold; that Thompson started to the Camp Ground about 12 o'clock, or a little after that time, and arrived at the Camp Ground after the close of the 3 o'clock services, which usually commence at 3 o'clock and continue about one hour and a half; that, when the defendant drove up to the Camp Ground, the horse was wet with sweat, and seemed to have been driven very hard; that the horse also appeared to be sick as well as fatigued, and wanted to lie down as soon as he was stopped; that the defendant, Witherspoon, was in the buggy with Thompson when they arrived at the Camp Ground, and Thompson said he had driven to the Camp Ground from Ringgold in an hour and ten minutes; that the horse died in about three hours after they drove up, and the defendants did all they could to save him; that in the opinion of one of the witnesses, the horse had been overdriven.

Thompson vs. Harlow.

The defendants introduced the following testimony, to-wit: The defendants left the town of Ringgold about one o'clock, with the horse in a buggy, and drove not more than five miles per hour; that the witness, Witherspoon, one of the defendants, saw no signs of the horse being sick, except that he appeared dull, and had frequent discharges from his bowels, and the witness stated to the other defendant, Thompson, soon after they left town, and when they were at the creek, that something must be the matter with the horse, that he was so dull, and dunged too freely; that, about four miles from Ringgold, the defendants met two other persons, and stopped for a few minutes; that these two persons said the horse was sick and his belly was swollen, and that defendants had better take him back to town; that witness thought they were joking, and the defendants replied that the horse was cow-bellied; that the horse had an unusually large body naturally; that, when the defendants arrived at the Camp Ground, the horse seemed to be sick, and, in the opinion of several witnesses, to have the cholice; that the defendant, Thompson, employed a man to doctor the horse, and that every thing was done by the gentleman thus employed that could be done under the circumstances, to save the horse; that Thompson did not remain with the horse, but went off to the stand, or to some of the tents, and left the horse in charge of the person employed to doctor him; that, when the horse was about to die, Thompson was sent for and came to where the horse was; that the person employed to doctor the horse, treated him for cholice, giving him soda and tobacco, and raking him with a fence rail, and the said person so employed thought the horse died of cholice.

Upon this testimony, the Jury returned a verdict in favor of the plaintiff for one hundred dollars and costs of suit.

Counsel for the defendant, Thompson, moved for a new trial, on the grounds:

1. That the Jury found contrary to Law.
2. That the Jury found contrary to the evidence.
3. That the verdict is not supported by the evidence.

Upon the hearing of said motion, at the May Term, 1860, the presiding Judge overruled the same and refused the new trial, and the Writ of Error in this case is prosecuted to reverse that decision.

Thompson vs. Harlow.

A. R. WRIGHT, representing DODSON, for the plaintiff in error.

McCONNELL & TRAMMELL, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The hirer of a horse is bound to take the same care of it that a prudent man would of his own property; and is responsible for all injuries that result from his neglect. If the horse becomes sick, or exhausted, it is his duty to abstain from using it, and if he pursues his journey, he is liable for all the injury occasioned thereby. *Story on Bailment*, § 405, 398. In this case, the horse hired by the defendant was discovered to be sick, and the attention of the hirer called to that fact, while he had as yet accomplished but a small portion of his journey. He, then, ought to have abstained from the further use of the horse in that condition. As he did not, but continued the journey, and the horse died at the end of it, the defendant is liable.

That the verdict was less than it ought to have been, was not a matter of complaint by the defendant. A new trial cannot be granted to him on that ground, and as that is the only error in the record, and in favor of the defendant, the new trial must be refused.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

PALMER vs. CLARKE & WIFE.

1. B. made a deed of gift to a grand-child of a negro girl that belonged at the time to himself, and subsequently sold and delivered the negro to one C., who bought with notice of the voluntary deed. The negro, many years afterwards, was found in the possession of one P., who purchased and held under G. On the trial of a suit, brought by the grand-child and her husband against P., there being no evidence to show that G. derived his title either from C., or the donee. *Held*, that P.'s title was not protected against the voluntary deed, by the fact that he purchased without notice—that this rule only applies, when both parties derive title from the same person.
2. A new trial will not be granted when the verdict can be supported by the evidence.

Trover, in Haralson Superior Court. Tried before Judge HAMMOND, at the October adjourned Term, 1859, and motion for new trial decided by Judge RICE.

This was an action, brought by Thomas Clark and his wife, Rebecca Clark, against George H. Palmer, to recover damages for the alleged conversion of a negro girl slave, by the name of Mary, but sometimes called Emeline, eighteen years old at the time said suit was commenced—in October, 1848—alleged to be worth one thousand dollars, and to be of the yearly value for hire of fifty dollars.

On the trial of said case, the plaintiffs introduced the following testimony, to-wit:

An original deed of gift from John Baird to Rebecca Baird, for a negro girl, by the name of Mary, dated in 1833.

The record of the marriage license and return, showing the intermarriage of Thomas Clark and Rebecca Baird, on the 13th of June, 1847.

An exemplified copy of the record of the Court of Ordinary of Franklin county, showing the appointment of John Baird as guardian of Rebecca Baird, in 1828, and his dismissal, on the 5th of December, 1836.

John Clark, testified: That, in the fall of 1833, in Franklin county, John Baird made a deed of gift to Rebecca Baird, then, but now Rebecca Clark, conveying a negro girl, then about three years old, of dark complexion, and by the name of Mary; that witness had married the daughter of John Baird and mother of Rebecca Baird; that John Baird

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delivered the deed of gift to the witness, who had it recorded; that John Baird called up Rebecca, and said: "There is your negro, I now deliver her to you;" that the negro remained in John Baird's possession until the latter part of the year 1836, when she was missing; that witness heard of her no more until in the year 1847; that Rebecca went home and lived with witness and her mother until 1847, when she intermarried with Thomas Clark, being then about twenty years old; that witness never saw the negro from the time she was missing until the 7th of August, 1848; that, at that time, he went to defendant's house and found the negro, who was then called Emeline; that, at that time, the negro was worth eight hundred dollars, and, although he has not seen her since, he believes her now to be worth twelve hundred dollars; and that she was worth for hire seventy-five dollars per year; that the plaintiff, Thomas Clark, on that day—the 7th of August, 1848—demanded the possession of said negro from the defendant, who refused to give her up; that in 1848, defendant told witness, the negro was a good conditioned negro, and a good field hand, and a good house hand, and from what defendant told witness, he, then, believed her worth eight hundred dollars, and if she is as good as defendant said she was, she is now worth twelve hundred dollars, and for hire an average of seventy-five dollars a year; that, in 1837, Wiley Clark acted as the guardian of Rebecca; that John Lackey told witness, in 1848, that he had notice of the deed of gift when he bought the negro, and that defendant told witness, that, when Goodwin sold the negro to him, he said there was an incumbrance against her, but it was cleared up, or nearly so; that witness is acting as agent for plaintiffs, but has no interest in the suit.

John B. Word, testified: That he witnessed the deed of gift read in evidence; that he knew the negro girl in dispute that in Christmas holidays, in 1836, he saw her conceal up stairs in the house of Benjamin Cleveland, who offered sell her to witness for a piece of land and one hundred and fifty dollars, provided the witness would run her to Mississippi and alter her name, to which witness replied: he would not cheat that worse than orphan child out of that negro every one Cleveland had; that he had a conversation with defendant about the time this suit was commenced, and

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defendant said he had heard of some difficulty about the title to the negro, but he understood it to be a judgment or execution; that Cleveland is witness' uncle.

Ann Clark, testified: That she saw the deed of gift executed, and the negro delivered, but the negro remained in Baird's possession, because, as Baird said, he was Rebecca's guardian, and he was afraid John Clark would charge Rebecca for raising the negro; that Baird was solvent at the date of the deed of gift, and told witness that the negro was stolen at the time she was missing.

The plaintiffs having closed their testimony, the defendant introduced the following testimony, to-wit:

John Baird and William Baird, testified: That the negro girl in dispute was sold to Benjamin Cleveland for a valuable consideration, by John Baird, and a Bill of Sale executed, and it, together with the negro, was delivered to him. W. W. Baird thinks Cleveland knew of plaintiff's claim; that the negro was not sold to Cleveland secretly, but openly, and the purchase price was paid by Cleveland.

The defendant, also, proved that the negro girl was sold by one Garner to Lackey, and by Lackey to Goodwin, and by Goodwin to the defendant.

There was some evidence of conversations between these different owners about incumbrances, judgment, and mortgages against the negro, but nothing was ever said amongst them about the deed of gift on which the plaintiff's title rests, and the proof showed that, when Palmer bought from Goodwyn, he was told by Goodwyn that the incumbrance was lifted, and that said incumbrance was a mortgage or lien to a man named Stone, of Tennessee.

David Robertson, testified: That he was acquainted with the negro girl; that she looks badly, and has long and frequent laying-up spells; that she is not, under present circumstances, and as she is, worth more than three hundred dollars; that, some years, her hire would be worth thirty or forty dollars, and in others, her hire would be worth nothing, but that she would be an expense and charge; that twenty-five dollars a year would be a high average hire for her; that she never brought but one child, which died in a day or two after its birth; never saw her doing any hard work; she is not a good field hand; never saw her splitting rails; has

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seen her plough and wash sometimes; her complexion is swarthy; defendant and witness married sisters.

George Wagnon, testified: That he had known the negro in dispute from the time the defendant bought her; her complexion is swarthy, and she looks badly; she is sometimes up and sometimes down; witness is frequently at defendant's house; defendant feeds and clothes his negroes well; the girl is, perhaps, worth four hundred and fifty dollars, but from her present condition and circumstances, the witness does not consider her services worth anything.

Defendant also introduced a Bill of Sale, executed and recorded, dated the 2d of June, 1850, made by John Goodwyn to him for said negro, at the price of four hundred and fifty dollars.

The Jury returned a verdict for the plaintiffs for the sum of one thousand dollars, to be discharged by returning the negro in twenty days, and the further sum of fourteen hundred and fifty-eight dollars and thirty-three cents for the hire of the negro, with cost of suit.

Counsel for defendant then moved for a new trial in said case, on the following grounds, to-wit:

1. Because the Jury found contrary to Law.
2. Because the Jury found contrary to evidence, and the weight of evidence.
3. Because the damages found by the Jury are excessive.

The presiding Judge granted the *rule nisi* for a new trial, and the same was, by the consent of the parties, heard before His Honor, George D. Rice, at chambers, at Marietta, Georgia, on the 21st of June, 1860, and upon the hearing, the said Judge passed the following order, to-wit:

"Upon hearing the argument upon this Rule, it is ordered that said Rule be overruled on all the grounds taken, except the third ground, and overruled on that ground, provided the plaintiffs will, and do write off, and remit all the damages for the hire of the negro, except one thousand dollars, and if such damages are not remitted, it is ordered by the Court that the verdict be set aside, and a new trial be awarded on the said third ground taken in the Rule."

This decision is the error complained of in this case.

KNIGHT, CHISOLM & WADDELL, and IRWIN & LESTER, for the plaintiff in error.

BUCHANAN, for the defendants in error.

By the Court.—LYON J., delivering the opinion.

The only ground relied on for a new trial is, that the verdict is contrary to the evidence. Counsel, in the argument, insisting—

First. That the plaintiff in error, Palmer, is an innocent purchaser of the negro that forms the subject of controversy, without notice of the outstanding voluntary title under which defendants in error claim.

Second. That the damages, or amount of the finding, both as to the value of the negro and the hire, are excessive.

1. We do not think that the plaintiff in error, under the facts of this case, is an innocent purchaser, without notice; or in a position to be entitled to the benefit of the Rule. Cleveland, who bought the negro from Baird, the donor, under whom the defendants claim, evidently bought with notice of this voluntary title. In a very few days after his purchase, he had the negro, then a little girl, concealed at his house, offered to sell her to his nephew at a very small price, provided she should be run off and her name changed. His nephew, indignantly, refused and gave as his reason that he would not wrong this worse than orphan—Mrs. Clark then an infant and now one of the defendants in error—for all that he, Cleveland, was worth. If Cleveland bought in good faith, and without notice, why this concealment? Why run off and change the name of the negro? Besides this, Cleveland was himself a witness on the trial. This was an important fact to be proven for the defence. If it was true that he bought without notice, he would have testified to the fact, but he does not. Both the Bairds testify, that they thought he, Cleveland, had notice of the title when he bought. All these facts, taken together, are sufficient to justify the conclusion that Cleveland bought with notice. Here, the whole inquiry ends; because no title was shown ever to have passed out of Cleveland for the negro. The first that we hear of her, after the interview between Cleveland and his nephew, she is in the possession of one Garner, but how she got there, or in what right he held her, does not appear. From Garner she is passed through the hands of different persons, by sale and delivery, down to the plaintiff in error. Now, although

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the plaintiff may have purchased in good faith, without notice, in fact, that there was anything against the title he was buying, still, as the title which he got was not connected with the original donor, and did not emanate from the same person that the voluntary deed did, under which defendants claim, and came down to him by a regularly connected chain of purchases and sales, he is not a *bona fide* purchaser without notice within the meaning of the Rule, so as to be protected against that title. If the plaintiff's title had been connected with Cleveland, and either he or any of those under whom he held had bought without notice of this title, the defendant's title would have been defeated. As it was not connected, he cannot claim the benefit of the Rule. The true title to the negro was in Baird, and by him was conveyed to Mrs. Clark, one of the defendants, by the voluntary deed. The subsequent conveyance by Baird to Cleveland did not affect that title, by reason of Cleveland's notice of that deed. Garner, under whom defendants hold, claims under neither the one or the other, but as to either, his holding was tortious. The plaintiff has, by his purchase, no better title than Garner had, and the fact that he bought without notice, no more makes his title good than if Garner had stolen the negro either from Mrs. Clark or Cleveland.

Then, are the damages excessive? We think not. The plaintiff here cannot complain as to the value that the Jury placed on the negro—one thousand dollars. For, if she was not worth so much, he ought to have given her up in satisfaction of the same, as by the verdict he was authorized to do. That he preferred to keep the negro is pretty strong evidence that he did not regard this amount an exorbitant estimate.

2. There is more difficulty as to the amount allowed for hire, but, under the evidence, we do not think the amount, to which the finding was scaled by the Court in its Judgment on the motion for a new trial, is excessive. The plaintiff has had this negro for nearly twenty years, and she was all the time worth something. One witness says twenty-five dollars, another, one hundred dollars per year. If fifty dollars a year be allowed, and that is quite small, and interest added to each year's hire, as it fell due up to the time of the finding, and we do not see why it should not be, as it is a part of what defendants were entitled to, or would have received

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but for the conversion, the finding would have been much larger than that allowed. So, on the whole, we can see no good reason for disturbing the Judgment of the Court below.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

HOLT vs. EDMONDSON.

When a party, desiring to appeal, pays the costs, tenders security, and demands an appeal from the Clerk during the Term at which the Judgment was rendered, and the appeal be not entered, from the fault of the Clerk, the Court, on application, will order the appeal to be entered *nunc pro tunc*.

Motion to enter an Appeal, in Whitfield Superior Court. Decision by Judge WALKER, at the April Term, 1860.

An action was brought in Whitfield Superior Court, in the name of the Central Bank of Georgia, for the use of James Edmondson, against Robert A. Holt, as endorser on a note, payable at the Central Bank, and negotiated in the same.

The case was tried at the October Term, 1859, and a verdict rendered in favor of the defendant.

During the same Term, and immediately after the rendition of the verdict, James Edmondson, for whose sole use and benefit the action was brought and prosecuted, went to the Clerk and paid the costs of said case, and tendered as his security on the appeal, Mr. Chapley B. Wellborn, who was unquestionably good, and who, in the presence of the Clerk, agreed to go Edmondson's security on the appeal. When the appeal was demanded, the Clerk did not then

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have time to make out the appeal-bond on the minutes, so that Edmondson and his security could sign the same, and it was agreed and arranged between the Clerk, Edmondson and Wellborn, that the appeal-bond should be made out, and Wellborn's attention should be called thereto in due time, and that the Clerk, or Wellborn either, might sign Edmondson's name to the appeal-bond. With this understanding and assurance, Edmondson left the Court, and went to his home in another county, and his only counsel in the case, Col. William K. Moore, had leave of absence from the Court to attend the session of the General Assembly, he being Senator from the county of Whitfield.

The principal Clerk was not able to transact business, from the adjournment of the Court until his death, a few months thereafter, and the appeal was not entered.

Mr. Wellborn lived in the same town with the Clerk, and was ready at any time to sign the bond, but his attention was not called to the matter at all.

Upon this state of facts, verified under a regular motion for that purpose, the presiding Judge passed the following order, to-wit:

"Ordered, that upon bond being given for the payment of the eventual condemnation money, in terms of the Law, the Clerk be directed to enter the said case on the Appeal Docket, and that the cause proceed to trial on the appeal."

The decision of the Judge passing this order is the error assigned in this case.

AKIN & McCUTCHEON, by JACKSON, for the plaintiff in error.

W. K. MOORE, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The appeal was properly allowed. The party against whom the verdict and Judgment was rendered, went into the Clerk's office, paid the costs, tendered sufficient security, and demanded an appeal during the same Term. This was all the Law required of him, and that the appeal was not entered, from the neglect of the Clerk, is not to prejudice the right of the party entitled to the appeal. This was in

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accordance with the rule prescribed by this Court in *Short vs. Cohen*, 11 Geo., 39, and has been steadily adhered to since. Then, when a party, in good faith, desires to appeal, and has done, or offered to do, all the Law required of him to appeal, and the appeal be not entered, or improperly so, that in all such cases, the Court, on application, will order the appeal to be entered *nunc pro tunc*.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

THE BANK OF GEORGETOWN vs. AULT & AULT.

A Clerk of the Superior or Inferior Court is not authorized, by Law, to collect money on judgments or executions obtained in, or sued out of, their respective Courts, and a payment made to a Clerk, on a judgment or execution, is not good as a payment against the plaintiff.

Illegality, in Whitfield Superior Court. Decided by Judge WALKER, at the May Term, 1860.

The record in this case presents the following state of facts, to-wit:

On the 16th of January, 1860, a writ of *fi fa* was issued by the Clerk of the Superior Court, of Whitfield county, in favor of the Bank of Georgetown, against Robert W. Ault and James A. Ault. On the 7th of February, 1860, whilst the *fi fa* was still in the Clerk's office, one of the defendant's paid to John W. Anderson, the Clerk, fifty dollars, on the *fi fa*, and took the Clerk's receipt therefor. On the 13th of February, the Clerk died. On the 1st day of March, 1860, the *fi fa* was placed in the hands of the

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Sheriff, when the defendants paid the sum due on the *fi fa* except the fifty dollars paid to the Clerk, and filed an affidavit of illegality to the *fi fa*, on the ground of payment.

The presiding Judge, in the Court below, decided: "That the payment of the fifty dollars to the Clerk was a valid and legal payment on the *fi fa*, and that the plaintiff was bound by it, and that the *fi fa* was proceeding illegally against the defendants."

This decision is the error assigned.

AKIN, by LESTER, for the plaintiff in error.

MCCUTCHEON & POPE, by JACKSON, *contra*.

By the Court.—LYON, J., delivering the opinion.

Was the decision of the Court below—that a payment to a Clerk of the Superior Court on a judgment or execution sued out in that Court was a good payment against the plaintiff—right? We think not. It is no part of the duties of the Clerk to collect money for plaintiffs on judgments or executions. It is his duty to issue the process of the Court for its collection, but not to collect the money on it. He has no more authority to make the collection than the Judge who presides in the cause, or the Jury who gives the verdict. It is argued, that because he is made subject to be ruled for money in his hands, by various Statutes, that his authority to collect may be inferred from such enactments. We think not. It is true, that the Clerk is subject to rule for money, but this must be understood with reference only to such money as he is, by Law, authorized to receive and to hold, subject to the order of the Court. For instance: he is authorized to collect costs in appeals, and in various other instances, for himself and for the other officers of the Court. When a tender is made and the money is brought into Court, he is the person to receive and hold it to abide the judgment of the Court. There are a great many instances where a fund is brought into Court, and while there forms the subject of litigation. In all such cases the Court may order the money into the custody of the Clerk, or of a receiver specially appointed for that purpose. Whenever money, in this way, or in any other, in the performance of the duties

of his office, comes into the hands of the Clerk, he is subject to the rule of the Court, to pay out the money according to its order. But this does not make him the agent of the plaintiff to collect money for him. Nor is the plaintiff bound by any such act, outside the duties of the office.

We have no doubt but that, if the plaintiff chose to ratify an act of collection by the Clerk, the money could be ruled out of his hands by the Court; nor, as in this case, but that he could be ruled by the defendant for this collection, as any officer of the Court might be, who had improperly received money in his hands, under color of office.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed. The Court erred in holding that "the payment of fifty dollars to the Clerk, was a valid and legal payment on the fi fa, and that the plaintiff was bound by it, and that the fi fa was proceeding illegally against the defendant," this Court holding that the Clerk of the Superior Court is not authorized, by Law, to receive or collect money for the plaintiff on Judgments or executions obtained in, or issuing from, that Court.

Welker vs. Wallace.

WELKER vs. WALLACE.

When money, belonging to plaintiff, in the hands of one partner of a firm, by whom it was collected for the plaintiff, is used by such partner in the business of the firm, the firm is liable to the plaintiff for the same, whether the money was known by the other partner to be the money of the plaintiff or not.

Assumpsit, in Fulton Superior Court. Tried before Judge BULL, at the April Term, 1860.

This was an action brought by Charles F. Welker, against Alexander M. Wallace, as the surviving partner of Wallace & Robinson, to recover the sum of three hundred and sixty-five dollars, with interest, alleged to be due to the plaintiff, from said defendant, as survivor of the said firm.

On the trial, the plaintiff proved that William C. Robinson, deceased, was one of the late firm of Wallace & Robinson, of which the defendant was the survivor, and after proving that the same was in the handwriting of the said Robinson, the plaintiff introduced an envelope, directed to "Col. Charles F. Welker, Welker's Mills, Roane county, East Tennessee," and post-marked, "Atlanta, May 8th, 1858;" and also introduced in evidence the following copy-letter, to-wit:

"ATLANTA, GEO., 7th May, 1858.

"*Dear Col.*—I had not time to write you sooner. I went to Carrollton the last of past week. Col. Boggus forked over. He had lost the note, and had to file his affidavit of the amount, and as Rhodahans were about making an assignment of their effects, he had not time to write for a copy of receipt, and had taken up the notion that it was payable in October, 1855, instead of April, and so lost you some interest. The net amount, after paying all expenses, is (\$365) three hundred and sixty-five dollars. The day after I got home we had a note in Bank maturing, and I used the money, as we were short, after paying heavy freight bills, and not having quick sales. We would like to use it thirty days at Bank rate of interest, of one per cent. How shall I send it? In check on Augusta, Charleston or New York, or in large bills on Georgia Banks? Our trade is good.

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Have a large stock on hand. Some 80,000 cwt. bacon in nice new casks, packed at Murfreesboro' and Nashville, and very superior article. The demand is not very brisk, but our sales are so much better than the same time last year, that we feel very much encouraged. If it were not for the rather pressing debts contracted in building our warehouse, we would be perfectly easy, and feel like we were making money. But I had no idea how much thinking, and how much work a man could do, until I felt the weight of debt. It seems almost impossible to get money on mortgages, without giving 15c. We would willingly give 10c for \$5,000, and secure by mortgage, and insurance against fire, and even then our rent would only amount to about \$300, less, by a great deal, than any men in our line in town pay, and not getting half such a house as ourselves. We hope to be able to strike the right man soon. Kate wrote to Ma this week and will give the news. Bacon, hog round, 9½; Sides, 11@11½; Hams, 9½@11; Shoulders, 8½@8¾; Lard, 10½@12½; Flour, \$2@2.30; Oats, 33; Wheat, 70@80; Corn, 60, sacked; Feathers, 33@35; Irish Potatoes, 40@45, sacked; Sweet Potatoes, \$1.25@1.50.

"Yours truly,

WM. C. ROBINSON."

Plaintiff also introduced Jabez R. Rhodes as a witness, who testified: That he clerked for the firm of Wallace & Robinson; that Robinson was the plaintiff's son-in-law, and that his wife's name was Kate; that the firm sold such articles as are mentioned in the letter, and that the said firm built a warehouse just before the date of the letter; that the firm had nothing to do with collecting the plaintiff's money in Carroll county; that it was Robinson's individual account; (that he knew of Robinson's paying off the note, as stated in the letter;) but this last item was ruled out by the Court, as the witness stated that he obtained his information from the books of the firm, which were not in evidence.

The plaintiff having rested his case, the defendant moved for a non-suit, on the ground that it did not appear that the defendant, Wallace, knew of the borrowing of money, as mentioned in the letter.

The Court sustained the motion for a non-suit, and refused to let the Jury pass upon the case made by the evidence; whereupon, an order was passed dismissing the action as in cases of non-suit.

Welker vs. Wallace.

This decision constitutes the error complained of in this case.

A. W. HAMMOND & SON, for the plaintiff in error.

GLENN & COOPER, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The Judgment of non-suit was improperly awarded. If it be true, as the evidence intimates, that the money of the plaintiff, in the hands of Robinson, the deceased partner, as the agent of the plaintiff, was applied by him in the business of the firm, the defendant is liable, whether he knew at the time or not, that the money belonged to the plaintiff. *Collier on Partnership*, § 391. *Richardson vs. French*, 4 *Metcalf*, 577.

This is not a case where money has been lent to one partner on the credit of such partner alone, and, therefore, not within the case of *Bond vs. Logan*, 13 *Geo.* 192, which is undoubtedly the Law. There is no evidence, in fact, that the plaintiff consented to its use, by the deceased partner, for any purpose. The evidence is, that Robinson, the deceased partner, applied for leave to use it, and his admission that he did so use it. My own opinion was, that this letter, or admission of Robinson, was sufficient to bind the firm, and the investigation (I have been able to give the authorities since,) has confirmed that opinion; (*see Pars. on Com.*, 158, 159, and notes and cases cited. 3 *Kent Com.* 40, 41. *Collier on Part.*, § 384, 390,) but my associates thought it better that there should be some other evidence that the money went into the business of the firm, and so the case was decided.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in awarding a non-suit in this case, on the ground, "that it did not appear that Wallace, the surviving partner, knew of such borrowing of the money," it being the opinion of this Court that if Robinson, the

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deceased partner, used the money in the business of the firm, that, in that case, defendant is liable for the same.

THE AUGUSTA MANUFACTURING COMPANY vs. WELLBORN.

1. When the verdict of the Jury is for the plaintiff, and there is sufficient evidence to authorize and require the Jury to so find, and the Court below grants a new trial, that Judgment is erroneous and will be reversed.
2. The interference by this Court with the discretion of the Court below in granting or refusing new trials is made a duty by the New Trial Act of 1853—4.

Complaint, in Whitfield Superior Court. Tried before Judge WALKER, at the April Term, 1860.

The Augusta Manufacturing Company brought suit against Chapley B. Wellborn, for the purpose of recovering the amount due on the following account :

“C. B. WELLBORN,
“To the Augusta Manufacturing Company.

“1854.					Dr.
“April 26th.	For 4 Bales $\frac{7}{8}$	Bro. Cotton :			
	\$133 54	6.84			
	133 67	6.95			
	133 72	6.85			
	133 75	7.03	—2767 @ 7c.	\$193 69	
	For one Bale $\frac{4}{5}$	Bro. Cotton :			
	\$135 88	6.80	@ 8 $\frac{1}{4}$ c.	\$ 56 10	
	Drayage,.....			25	

“At six months; due October 26th, 1854.

\$250 04

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		Dr.
"1854.		
"Dec. 30th.	For 4 Bales Bro. Cotton, $\frac{1}{4}$:	
	\$139 73 6.92	
	139 81 7.04	
	139 85 7.03	
	139 96 6.09—2789 @ 7c.	\$195 23
	For one Bale $\frac{1}{4}$ Bro. Cotton:	
	\$151 95 8.50 @ 8 $\frac{1}{4}$ c.	\$ 70 78
	Drayage,.....	25
"At six months; due June 30th, 1855		\$516 39
"Sept.	By Cash on account, being balance of remittance of \$240 00, after payment of bill, 1st February, 1854,.....	\$ 70
Balance due,.....		\$515 60

On the trial in the Court below, the plaintiff introduced in evidence the following letters, addressed to the agent of the plaintiff, to-wit:

"DALTON, GA., April 25th, 1854.

"Mr. James Hope, Agent:

"Send me one Bale $\frac{1}{4}$ Domestic, and four Bales $\frac{1}{4}$ Domestic. Yours truly,

"C. B. WELLBORN."

"DALTON, GA., Dec. 28th, 1854.

"Mr. James Hope, Agent.

"DEAR SIR:—Send me four Bales $\frac{1}{4}$ Domestic, and one Bale $\frac{1}{4}$ do. I will remit you the balance of former purchase about the 15th of January. Money is scarce. Times dull.

"Yours truly,

"C. B. WELLBORN."

The plaintiff, also, introduced in evidence the following Railroad receipts, to-wit:

"No. 227. Georgia Railroad, Augusta Depot, }
April 26th, 1854.

"Received, in good order, from Augusta Manufacturing Company, five Bales, marked: C. B. Wellborn, and consigned to same, Dalton Depot. 1040 Georgia Domestics.

"EUL, Agent."

"Georgia Railroad, Augusta Depot, Dec. 30th, 1854.

"Received, in good order, from Augusta Manufacturing Company, five Bales, marked: C. B. Wellborn, consigned to same, Dalton Depot. 1100 Georgia Domestics.

"BERRY, Agent."

The plaintiff, also, proved by its book-keeper, that the goods charged in the account sued on, were sold and delivered at the time specified, and at the prices charged, and were sold on a credit of six months; that the smallest bill, usually sold by the plaintiff on a credit, was five bales, though a less number was sometimes sold for cash; that defendant purchased goods from the plaintiff twice, previous to the bills sued on in this case, and paid for them in about six months after they were delivered to him; that it was the settled rule and understanding between those who dealt with the plaintiff, and the plaintiff, that interest should be charged and paid after six months from the date of the purchase. The plaintiff then closed.

The defendant introduced the following receipt, to-wit:

“AUGUSTA MANUFACTURING COMPANY.
AUGUSTA, GA., Sept. 1854. }
18th

“C. B. WELLBORN. *Dear Sir:*—Your favor of the 18th inst. is at hand, covering last halves of Bank notes for two hundred and forty dollars, which is now at your credit.

“Yours truly, “JAMES HOPE, Treasurer.”

The defendant, also, introduced Thomas B. Jolly, who testified: That, in the year 1855, (as he thinks,) he saw the defendant mail two letters to the plaintiff by different mails, one containing the right, and the other the left hand halves of Bank bills; that he did not recollect the amount of the bills; thought it was one hundred and fifty, or two hundred and fifty dollars; rather thought it was the latter; that he did not remember what month the letters were mailed; that the letters were directed to some body in Augusta, but he did not recollect who; that the letters were mailed before January. Being reexamined by the defendant, the witness stated: That he recollected that the letters were addressed to the Augusta Manufacturing Company, but did not recollect whether the name of James Hope, Agent, was on them or not.

The presiding Judge certifies that this witness, Jolly, was evidently intoxicated at the time he testified.

The testimony being closed, the Court, amongst other things, charged the Jury:

“That they were to decide from the proofs whether the money specified in the receipt introduced by the defendant was paid on the claim in suit in this case, or on some other

The Augusta Manufacturing Company vs. Wellborn.

claim; that the defendant is entitled to a credit for it somewhere, and if he has not received credit for it elsewhere, he is entitled to it on the account sued on."

Counsel for defendant requested the Court to charge the Jury as follows, to-wit:

"That a letter sent by mail is presumed from the known course of the department, to have reached its destination at the regular time, and to have been received (if addressed to the plaintiffs) at the plaintiffs' usual place of receiving letters. The Court remarking: "That, as a general rule, the principle of the request was true, but to make money, sent by mail, a valid payment, the debtor must show by proof either an express authority to remit by mail, or that it was the usual course of business between the parties for the defendant to remit money by mail at the plaintiff's risk."

Counsel for the defendant also requested the Court to charge the Jury:

"That the fact that the claim sued on was nearly barred by the Statute of Limitation, before suit was brought, was a circumstance from which the Jury might presume payment of the claim."

The Court refused so to charge the Jury, but on that subject charged as follows:

"The mere fact that the plaintiff did not sue on the claim until it was nearly barred by the Statute of Limitations, did not, of itself, raise a presumption of payment, but it was a fact in the case, and the Jury might consider it along with the other facts in the case, and from all the testimony, the Jury would decide whether any of the claim had been paid, and if any, how much of it had been paid."

Counsel for defendant also requested the Court to charge the Jury:

"That they might determine, and find as a question of fact from the testimony in the case, whether the defendant really mailed money to the plaintiff, and if so, whether it was in fact received by the plaintiff."

The Court refused to charge the Jury as thus requested.

The Jury returned a verdict in favor of the plaintiff for five hundred and fifteen dollars and sixty cents.

Counsel for the defendant then moved for a new trial of said case on the following grounds, to-wit:

1. Because the Court erred in charging, and refusing to charge, as herein before set forth.

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2. Because the Jury found contrary to Law and evidence and against the weight of evidence.

Upon hearing said motion for a new trial, the presiding Judge passed an order, setting aside the verdict and awarding a new trial, and this decision is assigned as error in this case.

W. K. MOORE, for the plaintiff in error.

JACKSON, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

1. The new trial was erroneously allowed in this case, as we think the evidence was sufficient to authorize and require the Jury to find for the plaintiff, as they did.

The two bills of goods, on which the suit was brought, were due and payable as follows: One for \$250 was sold and delivered on the 26th of April, 1854, and due at six months, say on the 26th of October, 1854; the other was sold and delivered on the 30th of December, 1854, for \$266 26, and due on the 30th of June, 1855. The plaintiff, having sufficiently proved the sale and delivery of these bills at the prices charged, was entitled to recover.

The payment made by the defendant, on the 13th September, 1854, of two hundred and forty dollars, evidenced by the letter of the treasurer of the 14th September, 1854, and which was plead by defendant as a part payment on the two bills, did not, in the opinion of this Court, apply properly as a credit to the bills sued on. The account sued on, and the evidence of the plaintiff, showed that the defendant had purchased a bill of goods previously to both of these, to-wit: on the first of February, 1854, which was due on the first of August, 1854. The letter, acknowledging the receipt, and the only evidence defendant had of its payment, stated that it was to his credit and the account sued on, and the evidence of the clerk showed that that payment was applied to the bill that was sold on the first of February, 1854. Another circumstance is, that, when this remittance was made, neither of the two bills sued on was due. That of the first of February, 1854, was, and although there is nothing wrong in paying money on accounts in advance of their maturity.

yet where there are two accounts, one past due a month and a half, and the other the same time to run before maturity, and a remittance is made, in the absence of all other proof, the presumption would be, that it was intended to apply to that which was past due. Another circumstance in this evidence, and a very conclusive one, is this: in the letter of defendant, of 28th December, 1854, and when the last bill of goods was ordered, he remarks—"I will remit you the balance of former purchase about the 15th January. Money is scarce. Times dull." If the remittance of \$240, on 13th September, applied to the bill due 26th October, it would have paid the whole of that bill but about \$10. Defendant would hardly have thought it necessary to excuse himself for so small a balance, when all but that had been paid up so long before its maturity. Then, again, the remittance was just the amount of the bill of 1st February, 1854, or within seventy cents of it. With all these circumstances to support the verdict of the Jury, it ought not to be disturbed.

No importance was attached to the evidence of Jolly, either by counsel in the argument, or by this Court. What he did know about a remittance evidently related to that of September, 1854.

2. The interference by this Court with the discretion of the Court below, in granting or refusing a new trial, is made a duty by the new Trial Act of 20th February, 1854. *Pam., Act 47.*

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in granting a new trial in said case.

THE PLANTERS' & MECHANICS' BANK OF DALTON vs. ERWIN.

1. Where a material alteration is made in an instrument, in a different handwriting from that in which it is written, and a plea of *non est factum* is filed, it is error to instruct the Jury, in such a case, that the Law presumes the alteration was made at the time the instrument was executed. The Law presumes nothing in such a case, but leaves the whole question to be passed upon by the Jury.
2. By the 9th section of the Charter of the Planters' & Mechanics' Bank of Dalton, it is declared that "the bills obligatory and of credit, notes and other contracts whatever, in behalf of said corporation, shall be binding upon the said Company: Provided, the same be signed by the President and countersigned by the Cashier of said corporation; and the funds of said corporation shall, in no case, be liable for any contract or engagement whatever, unless the same be signed and countersigned as aforesaid." *Held*, that Bank Bills, signed by a Vice-President, and countersigned by an Assistant Cashier, there being a regular President and Cashier in office at the time, discharging their respective duties, are not binding on the corporation.

Assumpsit, in Whitfield Superior Court. Tried before Judge WALKER, at the April Term, 1860.

This was an action brought by John Erwin, to recover the sum of one hundred and twenty-five dollars, due on thirty-four Bank notes, dated Dalton, July 1st, 1855, and purporting to be the notes of the Planters' & Mechanics' Bank of Dalton. The notes were signed by S. C. Hull, as Vice President, and countersigned by M. Hobart, as Assistant Cashier.

To this action the Planters' & Mechanics' Bank of Dalton, pleaded: That the notes sued on were not its act and deed; that it never authorized S. C. Hull and M. Hobart to sign said notes, and that said Hull and Hobart were not authorized by said Bank to act as Vice President and Assistant Cashier in any manner, or to bind the Bank in any form.

On the trial of said case, the plaintiff introduced the notes sued on, and proved that they were presented at the Bank and payment demanded, on the 16th of March, 1857, prior to the commencement of the action.

The plaintiff also introduced, in evidence, the following extract from the Minutes of the Board of Directors of the Bank, produced in Court under a notice:

The Planters' & Mechanics' Bank of Dalton *vs.* Erwin.

"DALTON, Sept. 18th, 1855.

"At a meeting of the Board of Directors of the Planters' & Mechanics' Bank of Dalton, held 13th September, 1855. Present: James Morris, David Preston, James H. Kibbie, and T. B. Thompson.

"On motion of James H. Kibbie, S. C. Hull, of Chicago, Illinois, be, and he is hereby, appointed Vice President of the Planters' & Mechanics' Bank of Dalton, Geo., so far as to authorize and empower him to sign, as Vice President of said Bank, _____ dollars of the bills of said Bank, of the new and last issue, from number _____ to number _____. Said order passed in consequence of the President of said Bank not being able to attend to the same in time, and for want of a sufficient number of impressions, and that M. Hobart, of Chicago, Illinois, be appointed Assistant Cashier, to sign with the Vice-President the above named, and the above amount and description of bills, which said office and the completion of said object, is all the powers delegated by said Directors of the Bank, to them.

"JAMES MORRIS,

"T. B. THOMPSON,

"JAMES H. KIBBIE,

"DAVID PRESTON."

It appeared from the said extract of the Minutes that the name of "Ichabod Tucker" had been erased or stricken out, and the name of "S. C. Hull" interlined, and that the name of "Charles N. Barnes" had been erased or stricken out, and the name of "M. Hobart" interlined.

The proof also showed, that the body of the extract from the Minutes was in the hand-writing of James Morris, and that the interlineations was in the hand-writing of James H. Kibbie; that the Bank had redeemed a small number of bills signed and countersigned like the bills sued on, but had afterwards repudiated the bills thus signed and countersigned, and refused to pay or redeem them; that in January, 1856, Hull was the clerk of Kibbie, in the town of Warren, Trumbull county, Ohio, and that Kibbie afterwards moved to Chicago, Illinois.

The defendant proposed to prove the reason assigned by the Bank officers for redeeming a few of the bills signed by Hull and counter-signed by Hobart, which was, "that they were ignorant of the number and amount of such bills, and

redeemed a few at first rather than that the credit of the Bank should suffer; but that so soon as they became aware of the number and amount of the bills in circulation, signed by Hull and Hobart, they—the officers of the Bank—promptly repudiated such bills as unauthorized;” which testimony being objected to, was repelled, and defendant excepted.

The defendant also offered in evidence an order on the Minutes of the Board of Directors of the Bank, passed since this suit was commenced, repudiating the bills signed by Hull and Hobart, and declaring the alteration of the Minutes as hereinbefore stated, a forgery; which testimony being objected to, was repelled by the Court, and defendant excepted.

The defendant also offered in evidence a bill of indictment against Kibbie for forgery in interlining the names of Hull and Hobart as aforesaid; which was objected to and repelled by the Court, and the defendant excepted.

The testimony being closed, the presiding Judge charged the Jury, amongst other things, as follows, to-wit:

The issue for you to try is, whether the notes sued on are the notes of the Bank or not. The plea of *non est factum* puts upon the plaintiff the burthen of showing that the notes sued on are the notes of the Bank. To do this, the plaintiff has introduced the Minutes of the Board of Directors of the Bank, and read from it an order passed by the Board, authorizing, as he insists, the parties—Hull and Hobart—who signed these Bills as officers of the Bank, to act as Vice-President and Assistant Cashier. Having shown this authority, the plaintiff insists that Hull and Hobart were authorized to bind the Bank by signing bills. To this the defendant replies, that the charter of the Bank only authorizes the issuing of notes by the signature of President and Cashier, and that the Board of Directors could not authorize any one, as Vice-President and Assistant Cashier, to sign notes binding the Bank, and that if the Bank could be bound by such action, still, it is not bound in this case, because a forgery has been committed by one James H. Kibbie, by erasing from the order, as originally passed, the names of Tucker and Barnes, and inserting in lieu thereof, and without the knowledge or consent of the Board of Directors, those of Hull and Hobart. In the opinion of the Court, an order or resolution of the Board of Directors, authorizing certain persons to sign and issue bills in the name of the Bank as Vice-Presi-

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dent and Assistant Cashier, is sufficient authority to make notes so signed and issued, the notes of the Bank, and bind it to redeem them. And if you find that such an order or resolution has been passed, and these bills were signed and issued under the authority of such an order, and that they have been presented, and a demand and refusal of payment made, this will authorize you to find for the plaintiff. But if you find from the evidence, that the erasure of the names of Tucker and Barnes, and the insertion of those of Hull and Hobard, was a forgery, then the Bank is not liable to pay these bills. Kibbie, though one of the Directors, would not be authorized in the absence, and without the knowledge and consent of the Board, to alter the Minutes of their proceedings; and if he did so alter the proceedings, then these notes would not be the notes of the Bank, and you should find for the defendant. The presumption of Law is, that an erasure appearing upon a paper signed up, was made at the time it was executed; but this presumption may be rebutted by proof. In this case you may consider all the evidence before you, and, from that, determine whether the erasure or interlineation was made by the Board, or was a forgery. You may inspect the writing itself and gather all the aid you can from that. The verdict should turn upon the question, whether the names of Hull and Hobart were put in the order by the Board or not. If they were, the Bank is liable; if not, the Bank is not liable. Something has been said about the notes being signed out of the State of Georgia. I do not recollect any testimony going to show where they were signed. In the opinion of the Court, it is not material where they were signed. If they were signed by the proper officers of the Bank, the Bank is liable for them; if not, it is not liable.

The Jury returned a verdict in favor of the plaintiff for one hundred and twenty-five dollars principal, with interest from the 16th of March, 1857, and ten per cent. damages on the principal sum.

Counsel for the defendant then made a motion for a new trial in said case, on the following grounds:

1st. Because the Court erred in rejecting the evidence offered by the defendant to show the reasons assigned for redeeming some of the bills signed by Hull and Hobart, and that such bills were promptly repudiated when the Bank

learned the extent of the circulation issued by said Hull and Hobart.

2d. Because the verdict of the Jury was contrary to evidence, and without sufficient legal evidence.

3d. Because, if the Minutes of the Board of Directors were genuine, and the Board had had power to bind the Bank, yet no authority is shown to sign the particular bills sued on.

4th. Because the Court erred in instructing the Jury that the Directors had power to bind the Bank for the payment of bills issued by persons as Vice-President and Assistant Cashier.

5th. Because the Court erred in charging the Jury, that the Board could appoint a Vice-President and Assistant Cashier residing beyond the limits of the State, and that such appointees had the power to bind the Bank, by signing and issuing bank notes out of the limits of the State, and in instructing the Jury that it was not material where the notes were signed.

6th. Because there was error in the charge given.

7th. Because the Court erred in charging the Jury that "the presumption of Law was, that an erasure appearing on a paper signed up, was made at the time it was executed," it having been shown by the evidence that the body of the Minutes was in the hand-writing of James Morris, and the interlineation in the hand-writing of James H. Kibbie.

After hearing argument, the Judge overruled the motion, and refused the new trial, and this is the error assigned in this case.

MOORE & JACKSON, for plaintiff in error.

MCCUTCHEON, by MILNER, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the Court erred in charging the Jury, that the presumption of Law was, that the alteration in the order on the Minutes of the Bank-book was made at the time the order was entered. The order was written on the Minutes in the hand-writing of James Morris. The insertion of different names from those contained in the original order, was in the hand-writing of Kibbie, who is charged with having perpe-

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trated the forgery. The plea of *non est factum* was filed by the Directors; and the Court should have presumed nothing—for in such case the Law presumes nothing—but should have left the whole question to have been passed upon by the Jury. *Printup vs. Mitchell*, 17 *Ga. Rep.* 558. Nor does this view of the Law contravene the earlier case of *Secalie vs. Dill*, 2 *Kelly Rep.* 128. This Court, after referring to numerous decisions upon this controverted doctrine, come to the conclusion that the *defendants* would have been entitled to a verdict in that case, had they not failed to put in the plea of *non est factum*. In the case before the Court, that has been done.

I look upon this question, however, as one of minor importance. It will not occur on another trial. Besides, I must say, that to my mind, there is little merit in this plea, as the face of the Minutes show that it was the purpose of the Board of Directors to appoint a *Vice-President* and Assistant Cashier, if not the particular persons whose names were substituted by interlineation in the place of those originally nominated.

The great question in this case is, were these bills signed by the Vice-President and Assistant Cashier binding upon the corporation?

The words of the Charter of the Planters' & Mechanics' Bank of Dalton are peculiar in this respect: By section IXth, it is declared that "The bills obligatory and of credit, notes and other contracts whatsoever in behalf of said corporation, shall be binding upon the said Company: *Provided* the same be signed by the President and counter-signed by the Cashier of said corporation." So far, the language is similar to that of the South-Western Bank of Georgia, chartered at the same session, and to like clauses, in most of the bank charters granted in this State, and might be construed to be directory, merely. But the section stops not here, but proceeds: "And the funds of said corporation shall in no case be liable for any contract or engagement whatever, unless the same be signed and counter-signed as aforesaid." (*See Pamphlet Acts 1853-4, p. 190.*)

If bank bills are included in the clause to which this prohibition applies, there would seem to be an end of the question. At the very time when these new appointments were made, and the appointees authorized to fill up bills to an un-

limited amount, there was a regular President and Cashier in the discharge of their duties; and the only reason assigned for this violation of the charter was, that money could not be manufactured fast enough; that is the substance of it, and hence, subordinates are constituted, who resided in the State of Illinois, to fill up an impression which was never in the Bank, and thus flood the North-West with an irredeemable currency.

As to the personal liability of the Directors, we have nothing to say; but for the protection of the stockholders, and those who hold the genuine bills of the Bank, signed by the President and Cashier proper. we are not disinclined to see this spurious circulation repudiated.

If it be said, that these bills have got into the hands of innocent holders, our reply is, that they could have protected themselves by looking at the charter, which, in strong phraseology, has exempted the corporation from liability for bills thus signed. The want of power to bind even the corporate funds, in this way, was patent, and whosoever would, might avoid imposition.

It may be suggested that, by the Vth section of the Charter, the Directors were authorized to appoint such officers and clerks under them as might be deemed necessary for executing the business of the corporation. But a cursory examination of that section will show that it was not intended to clothe the Directors with the power to appoint co-ordinate officers to perform functions which could alone be discharged by the President and Cashier, and especially during the continuance in office of those incumbents. It is not unusual, we believe, for banks to appoint a president *pro tempore* and an assistant cashier. The former is invested with all the powers of president for the time being; he is, in fact, the president. Assistant Cashiers aid the regular cashier in the performance of his onerous duties. But the assistant never counter-signs bills. The very mode of signing these bills indicates that a swindle was intended. The *V.* added to the name of the Vice-President, and the *Ass.* to that of the Cashier are so obscure as not to be noticed by an ordinary person or a casual inspection.

Morton vs. Morris.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in charging the Jury that the alteration made in the order passed by the Directors was done at the time that the order was put upon the Minutes, and also in holding that the bills sued on in this case were binding upon the Company.

MORTON vs. MORRIS.

For a debtor to protect himself against loss, by remitting money to his creditor by mail, he must show either the express authority of the creditor to send in that mode, or a usage to that effect in business, from which the creditor's authority may be inferred.

Complaint, in Whitfield Superior Court. Tried before Judge WALKER, at the April Term, 1860.

This case came up, and was adjudicated upon the following state of facts, to-wit:

William R. Morton instituted an action in the Superior Court of Whitfield County, against James Morris, to recover the sum due on a promissory note made by the defendant, payable to the order of the plaintiff, dated Charleston, 29th of April, 1856, due at six months, for one hundred and forty-eight dollars and eighty-three cents.

To this action the defendant pleaded, that he had paid the note sued on, by remitting the money by mail to the plaintiff at Charleston, South Carolina, at his request.

It appeared by the evidence adduced on the trial of said case, that the plaintiff, by J. R. Gibbs, his clerk and book-keeper, addressed the following letter to the defendant, to-wit:

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“CHARLESTON, 18th of May, 1857.

“MR. JAMES MORRIS—*Dear Sir*: We will be exceedingly obliged to you, if convenient, to remit us the amount of your note due Oct. 29, '56, for one hundred and forty-eight dollars and 83 cents, with interest to 28th May, 1857, \$6.07, amounting, in all, to \$159 90. Money is very scarce here, and your attention will greatly oblige

“Your friend,

“W. R. MORTON,

“per J. R. GIBBS.

“Please send us a draft if possible.”

The defendant, on the 26th of May, 1857, deposited in the post-office at Spring Place, Georgia, a letter addressed to the plaintiff at Charleston, South Carolina, which letter contained two one hundred dollar bills, on the Bank of Hamburg, South Carolina, and bills of other banks, making, in all, the sum of two hundred and eighty-four dollars. The letter was duly registered by the said post-master, and a receipt for the letter given by him to the defendant.

The clerk and book-keeper of the plaintiff testified that it was the plaintiff's usual custom to write letters to his customers in the country, to remit the amounts of notes past due, but that the plaintiff did not authorize the defendant to mail the money due upon the notes sued on at his—the plaintiff's—risk.

Several letters between the parties were read in evidence, in which the defendant insisted that the money was mailed in strict compliance with the order and instructions of the plaintiff, and that the note was therefore paid; all of which the plaintiff, in his letters, denied, and insisted, upon the contrary, that the money was mailed by defendant at his own, and not the plaintiff's risk.

There was no evidence that the plaintiff ever received the letter containing the money, but, on the contrary, the parties, in their correspondence upon the subject, treated it as lost.

The testimony being closed, counsel for the plaintiff requested the Court to charge the Jury as follows, to-wit:

“Where a remittance of payment is made by *post*, the debtor must show that it was properly sealed and directed, and delivered to the officer, and it must appear that he was either directly authorized by the creditor to take this course,

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or that such had been the usual course of dealing between the parties, from which an authorization may be presumed. He is bound to use all care and diligence appropriate to the occasion, and in case there be no direction by the creditor, the debtor should take the precaution of cutting bank notes, or similar securities."

This charge the Court refused to give, but, on the contrary, charged the Jury:

"That if it was shown that the defendant had received a letter from the plaintiff, requesting him to remit the amount of the note sued on, and that the defendant had mailed the amount of said note in bank bills, and that the mail was the usual mode of conveyance between the two points—Spring Place and Charleston—that it was payment by the defendant, whether it was shown that the plaintiff had received the remittance or not, and that in such case it was not necessary for the defendant to cut bank bills, unless so requested by the creditor."

The Jury returned a verdict for the defendant.

Whereupon, counsel for the plaintiff moved for a new trial of said case, on the grounds—

1st. Because the verdict of the Jury was contrary to, and unsupported by the evidence.

2d. Because the verdict was contrary to law.

2d. Because the Court erred in charging, and refusing to charge the Jury, as before stated.

The Court refused the new trial, and that decision is the error assigned in this case.

MILNER & PARROTT, for the plaintiff in error.

JOHNSON & JACKSON, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Under all the circumstances, we think it best to remand this case for a re-hearing. We are not satisfied that the rule of Law regulating this transaction was correctly laid down by the Court. Instead, a majority of the Court are inclined to hold that it was not; and we feel quite sure that, upon another trial, the evidence could be made more satisfactory.

Mr. Morris' note was payable at Charleston. Mr. Morton

requested him, by letter, to *remit* the amount, adding, in a postscript, "Please send us a draft if possible." The amount of the note was inclosed in a letter and mailed at Spring Place, the residence of Morris. The letter containing the money was duly registered at the post-office. Whether it was sealed, does not appear.

The rule of Law regulating this case is thus stated, with but little variation, in all the Text-Books: "Payment is often made by letter, and the question arises, at whose risk it is, when so made? This must depend upon circumstances; but in general, the debtor is discharged, although the money do not reach the creditor, if he was directed or expressly authorized by the creditor so to send it, or if he can distinctly derive such authority from its being the usual course of business, and not otherwise. 1 *Parson's on Contracts*, 132.

And Mr. Greenleaf says: "When payment is made by a *remittance by post* to the creditor, it must be shown on the part of the debtor that the letter was properly sealed and directed, and that it was delivered into the post-office, and not to a private carrier or porter. He must also prove either the express direction of the creditor to *remit in that mode*, or a usage, or course of dealing, from which the authority of the creditor may be inferred. Where these circumstances concur, and a loss happens, it is the loss of the creditor." 2 *Greenlf. Ev.* §525.

Both writers cite the same authorities, namely: 1 *Peake* 67; *id.* 186; *Ry. & M.* 149; *Peake on Ev. by Norris*, 412.

It would seem, therefore, that a remittance by post is no discharge, unless there be express authority to send in that mode, or can be inferred from the usual course of business. Indeed, it has been held, that sending bank notes uncut, by direction, will not discharge the debtor; because it is usual among prudent people to cut such securities in halves, and send them at different times.

It is clear, that to *remit* does not *ex vi termini* mean to transmit by mail. Its etymological signification is to send money by bills, check or otherwise, from one person to another, at a distance more or less remote from each other. Mr. Greenleaf does not so understand it; otherwise, he would not be guilty of the tautological blunder of using the phrase, "*remittance by post*."

Perhaps proof can be made upon another trial, that such

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was the usual way of transmitting funds from Spring Place to Charleston, and that it was known to Mr. Morton. That it is not the only mode, is quite certain; for not only might private agency be resorted to, but the remittance by Express is more reliable; and then the Company is liable for loss, which the post-office is not.

As we cannot, then, direct a re-argument without ordering a new trial, we prefer to give this case that direction, rather than endorse the doctrine as laid down by the Court in its charge to the Jury.

We would suggest, that some effort be made to ascertain whether this letter reached the post-office at Charleston.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be reversed, upon the ground that the Court erred in not granting a new trial in this case.

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Where parties are already in a Court of Equity, and the remedy at Law is not likely to afford full, adequate and complete relief, they will not be driven into another forum.

In Equity, in Coweta Superior Court. Decision by Judge HAMMOND, at the March Term, 1860.

Francis D. Bowen filed his Bill in Equity, in the Superior Court of Coweta county, in which he alleged the following facts, to-wit:

In the year 1846, or 1847, John Bowen purchased the life-estate of Patsy McCoy, in a negro man by the name of

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Patrick, a negro woman, by the name of Jenny, a negro boy, by the name of Willis, and a tract of land in the county of Campbell, known as the McCoy place, for which life-estate the said John Bowen agreed to pay to the said Patsy McCoy five hundred and fifty dollars, annually, and that a written contract to that effect was duly executed by the parties, the said John Bowen giving security for the faithful performance of his part of the contract; that pursuant to said contract, the said Patsy McCoy transferred and delivered the said negroes and land to the said John Bowen, who continued in the possession of the same until his death; that, in the year 1852, the negro woman Jenny gave birth to a girl-child, which has been named Patsy, and which was also in the possession of the said John Bowen at the time of his death; that John Bowen was a member of the firm of Bowen & Brothers, against which firm the complainant obtained a judgment in Carroll Superior Court, on the 22d of December, 1854, for the sum of \$815 08 principal, and the sum of \$194 interest, and the sum of — dollars, for costs, from which judgment a *fi fa* issued on the 12th of January, 1855; that, in July, 1855, the said John Bowen died insolvent, and there has been no administration on his estate, nor is there likely to be; that a short time after the death of the said John Bowen, his widow, Harriet Bowen, who had possession of the written contract aforesaid, either destroyed the same, or delivered it to one Horton, the agent of Patsy McCoy, both of whom reside out of the State of Georgia, and that said Horton, as such agent, took possession of the said land and negroes, through his sub-agents, Bennett H. Conyers, of the county of Cass, Joseph J. Pinson, of the county of Coweta, and William B. Conyers, of the county of Carroll; that said agents have been hiring out said negroes, and renting said land, and receiving the profits, arising therefrom, ever since the death of the said John Bowen; that the destruction or delivery of said contract to Horton by the widow of John Bowen, and the taking possession of said land and negroes by Horton and his said sub-agents, were done for the purpose of defeating the collection of said judgment in favor of the complainant; that complainant has had his said *fi fa* levied upon said negroes, which have been claimed by said Horton and Bennett H. Conyers, as the agents of the said Patsy McCoy, which claims are now pending in Carroll.

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Superior Court; that the complainant believes and charges that these claims have been interposed, and will be kept in Court, if possible, until after the death of Patsy McCoy, who is a very aged lady, so that the said land and negroes may then go to the remaindermen, and the rent of said land, and the hire of said negroes, be secured to the said Patsy McCoy during the time that said claim cases can be kept in Court, and the trials thereof staved off; that said Pinson has in his hands \$250, arising from the hire of negro Willis, and now has him hired out for \$180, for which he has a note; that William B. Conyers has now in his hands (if not paid over to Bennett H. Conyers) the sum of \$150, arising from the hire of Patrick, Jenny and her child, and has them now hired out for the sum of \$150, for which he has a note; that Moses M. Smith rented said land from John Bowen in his life-time, and since his death, has attorned to said Horton, as agent for Patsy McCoy, and that Hugh Brewster, of Coweta county, either bought an interest in said land from Smith, or agreed to pay the rent thereof jointly with Smith, and that the said Smith and Brewster jointly, or the said Smith alone, now owes the sum of \$300 for the rent of said land, if they have not paid it over, and that they owe that sum for said rent for the present year 1858, for which they have given their obligation; that the said sums of money, and notes, and obligations, given for the hire of said negroes and the rent of said land, will be withdrawn and paid over to said Patsy McCoy, who resides in Mississippi, (unless restrained by process from a Court of Chancery,) and the complainant be left without remedy; that complainant cannot prove the allegations of his bill without a resort to the conscience of the defendants for a discovery.

The complainant, by his bill, prays for: A discovery of the facts by the answer of the defendants; also an injunction, restraining each and all of the parties from paying to Patsy McCoy or any one else the money in their hands arising from the hire of said negroes or the rent of said land, and from delivering to said Patsy McCoy, or any one else, the notes and obligations given therefor; also for such other relief as the facts of this case call for.

To this bill, Bennett H. Conyers set up a demurrer, on the following grounds, to-wit:

1. Because the bill is wanting in proper parties.

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2. Because the complainant has a complete remedy at Law.

3. Because there is no Equity in said bill.

Upon the hearing, the presiding Judge overruled the demurrer, and retained the bill, and this decision is complained of as error.

BUCHANAN, for the plaintiff in error.

POWELL, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the Court was right in overruling the demurrer to the bill in this case. In addition to the discovery which is sought, the Common Law remedy, by process of garnishment, is not so complete. Indeed it is not an adequate remedy.

In the case of *Field et al. vs. Jones and another*, 10 *Geo. Rep.*, 229, the person in possession of the effects held them directly under the debtor. Here, Conyers and the other defendants do not claim under Bowen, the debtor, but under Mrs. Patsy McCoy. They might, in truth, say in response to a summons of garnishment, that they had in their hands no effects belonging to the estate of Bowen. Again, in the case of *Field vs. Jones*, the Common Law Courts had first acquired jurisdiction, and the learned Judge, who delivered the opinion of this Court in that case refers to that. Here, the contrary is true. The parties are in a Court of Equity, where the remedy, we must think, will be more full.

In *Phillips vs. Wessen & Another*, 16 *Geo. Rep.*, 137, this Court maintained a bill upon a slighter ground than this rests, owing to the obstacles which might be interposed to garnishment process.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

Ford vs. Buchanan.

FORD vs. BUCHANAN.

Where a suit is instituted at Law, and the proceeding at Law is enjoined by Bill—which seeks both discovery and relief—when the equity cause is reached in its order and called for trial, it is error in the Court to dissolve the injunction and direct the Common Law action to proceed; especially if a motion had been made at a previous stage of the litigation to dissolve the injunction and rightfully refused, and there having been no change in the pleadings in the meantime.

In Equity, in Cass Superior Court. Decision by Judge WALKER, at the March Term, 1860.

This was a Bill in Equity, exhibited by Francis M. Ford, against Robert Buchanan, in which the complainant alleges:

That in the year 1853, the complainant being a producer of pig iron in the county of Cass, in the State of Georgia, was told by the defendant, who then lived, and who still resides in the city of Cincinnati, in the State of Ohio, that pig iron was worth, and could be sold in the said city of Cincinnati, for from forty-three to forty-eight dollars per ton of 2240 pounds; that the said defendant was at the time a commission merchant, carrying on business in said city of Cincinnati, and in consequence, and in consideration of said representations of the defendant as to the value of pig iron, a contract was made between the parties that complainant should ship pig iron to the defendant, to be by him sold and disposed of on commission, and as the factor and agent of the complainant: that under said contract, complainant drew three bills of exchange upon the defendant for two thousand dollars each—the first dated 26th of September, 1853, and due at six months, the second dated 28th February, 1854, and due at five months, and the third dated the 15th of March, 1854, and due at four months—all of which, as complainant believes, were accepted and paid by the defendant: amounting in all to six thousand dollars: that on the 22d of April, 1854, complainant accepted and paid off a draft drawn by the defendant on the complainant, for two thousand dollars, payable in New York, upon which the defendant realized a premium amounting to twenty-five dollars; that in the years 1853 and 1854, the complainant shipped to the defendant, to Cincinnati, under the contract aforesaid, about one

hundred and sixteen tons of pig iron—worth, at the time the same was received by the defendant, from \$43 00 to \$48 00 per ton, which, at the former price, was worth, in the aggregate, the sum of \$4,988 00, and at the latter price, \$5,568 00 or other sum near that amount; that the freight on said pig iron from Cartersville, Georgia, to Cincinnati, Ohio, was \$8 50 per ton, amounting to \$986 00, which sum deducted from the value of the iron at \$43 00 per ton, would leave said iron of the net aggregate value of \$4,002 00 laid down in Cincinnati, and when deducted from the value of the iron at \$48 00 per ton, would leave in the hands of the defendant in Cincinnati \$4,682 00; that by adding the amount of the draft accepted and paid by complainant, as aforesaid, and the premium realized thereon to the net value of the iron at the smaller price, would make the sum of \$6,027 00, and when added to the value of the iron at the larger price, would make 6,697 00; that if said iron had been properly disposed of, would have yielded the defendant for complainant at least the net sum aforesaid of \$4,002 00, which, with the draft aforesaid, accepted and paid by complainant, together with the premium thereon, make the sum of \$6,027, amply sufficient to have paid off the bills of exchange drawn by complainant on the defendant as aforesaid; that at the greater price, said iron ought to have yielded complainant, together with the said draft and its premium, the sum of \$6,697, which sum exceeds the amount of the bills of exchange the sum of \$697; that the defendant, for the purpose of defrauding the complainant, has carefully concealed from him all the facts connected with the sale of said pig iron—when it was sold, to whom and at what price sold, and whether for cash or on time, and refuses to render any account of such sale, or to account therefor as commission merchant and factor; that the defendant falsely represents that he has disposed of said pig iron, and that more than half of the proceeds arising from the sale of the same have been applied to the payment of certain charges, which the complainant alleges are false, fraudulent and iniquitous, and gotten up by defendant for storage, commissions, interest, freight, premiums, and other charges having no foundation; that the said defendant, pretends to have failed in business, and to have assigned the pretended indebtedness of complainant to him, to one John T. Lewis and Robert M. Shoemaker, of said city of

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Cincinnati, and that the said Robert Buchanan, for the pretended use of said Lewis and Shoemaker, commenced an action of assumpsit returnable to the September Term, 1856 of Cass Superior Court, against the complainant on an account stated for \$6,000, besides interest—which action is now pending on the appeal in said Court; that the statement or account sued on in said action does not show the indebtedness of complainant to the defendant, because, upon a full and fair settlement it will appear that the defendant is indebted to the complainant; that unless restrained, the said action at Law will proceed against the complainant, and an unjust recovery be had therein by the said defendant, without accounting to complainant for said pig iron: that some time in the year 1856, the said defendant, for the purpose of further defrauding the complainant, procured, as complainant believes, one Milton A. Candler to visit the complainant, in order to extract from him an admission of the correctness of the account as sued on in said action of assumpsit, and that said Candler has testified in answer to interrogatories taken out in said action, that complainant admitted an indebtedness to the defendant of over three thousand dollars on the condition of said account stated, together with the false and fraudulent charges aforesaid; that if the complainant made any such admissions, they were made in total ignorance of the condition of the account, as well as the disposition that had been made of the pig iron aforesaid; that what the complainant intended to admit, and may have admitted, was, that he did draw the bills of exchange aforesaid, and that the amounts of them were correctly stated, but not that he was at all indebted to defendant in the premises.

The complainant, by his bill, prays: That the defendant may, on oath, answer the charges of the bill, and discover the facts; also, that the defendant may render a full account of the sale of the pig iron, and account for the proceeds; also, that the bills of exchange sued on may be cancelled and delivered up; also, that the said action at Law may be enjoined until the hearing of the bill; and also, for general relief.

The injunction issued, as prayed for.

The defendant, Robert Buchanan, filed his answer to the complainant's bill, in which answer he admits: That complainant was a producer of pig iron in Cass county, Georgia.

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and that he, the defendant is a commission merchant in the city of Cincinnati, where he is carrying on, and has carried on such business for more than thirty-five years; he admits that the drafts were drawn by complainant, as stated in the bill, but denies that they were drawn at the solicitation of defendant, but were accepted by defendant, as were also the consignments of pig iron hereinafter mentioned, at the earnest request, and for the use and benefit of the complainant; that said bills of exchange were accepted and paid by the defendant, upon the faith of complainant's agreement to consign to defendant for sale in Cincinnati, Ohio, pig iron of good quality, sufficient to cover the entire amount of such acceptances, together with the defendant's charges and commissions for the same, and also all other advances and commissions on sales, and charges and disbursements for freight, insurance, labor, weighing, advertising, storage, interest, and all other expenses customary amongst merchants; that about the 26th of June, 1854, defendant received $112\frac{1}{2}\frac{1}{2}$ tons of pig iron from the complainant, which was all he ever did receive. He denies that the iron was to weigh 2,240 pounds per ton, but that each ton was to weigh 2268 pounds; he denies that the iron received was of good quality, or that it was worth in the Cincinnati market, when received, or at any time up to the time of selling the same, from \$43 to \$45 per ton, but was worth, during the latter part of that period, \$25 per ton, and no more; that on the 20th of January, 1855, finding it difficult, if not impossible, to sell the iron in Cincinnati, and in order to place himself in funds to meet his said acceptances for the complainant, the defendant took all of said iron to his own account at a credit of six months, at \$25 per ton, which was the highest market price, and the best terms at and on which the iron could be disposed of; that after deducting from the amount of said sale the advances for freight, and the usual and customary charges for labor, storage, weighing, drayage, interest, and commissions, there remained to the credit of complainant the sum of \$1,239, which was so applied as a credit, as of the 1st day of August, 1855, on the acceptances aforesaid; that a full and perfect account of said sale of the iron was forthwith rendered to complainant, which was ratified by him without objection; that the defendant, after taking the iron to his own account, forthwith shipped the same to Pittsburgh, where it was sold

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by a competent factor, at a sacrifice to defendant of \$559 90, for which he expects nothing from complainant; that in taking said iron to himself, as complainant's factor, he took it at more than the full market value of the same, and has fully accounted to complainant therefor; that he has not concealed, nor does he now conceal, anything connected with the pig iron, and denies that any of the charges in his account are unjust or otherwise than fair, usual and customary among merchants; the defendant denies that he has failed, although some of his paper went to protest, and is still unpaid, but he is still in the same business, and at the same place where he has carried it on for more than forty years past; he admits the sale of the claim on complainant to Lewis and Shoemaker, and that suit is pending thereon as charged in the bill; the defendant denies owing complainant anything, but insists that the account sued on shows the true condition of the indebtedness between complainant and the said Lewis and Shoemaker, the assignees of defendant; the defendant denies ever at any time contriving to defraud complainant by extracting admissions from him through Mr. Candler or others, but insists that if the complainant admitted his indebtedness to defendant, according to the statement of said account, he did it with a full knowledge of the facts, and in accordance with similar admissions to the defendant; the defendant admits that the first bill drawn on him by complainant for \$2,000 was paid by complainant by a draft on New York, which, together with \$25 premium received by defendant, were duly applied as a credit upon the indebtedness of the complainant—an account of which is as follows:

"29 January, 1855, at 6 months.

"112 $\frac{219}{226}$ tons pig metal, c 25# \$2,809 00

"Charges.

"26 June, '54—paid railroad charges,	\$145 00
" freight 116 $\frac{219}{226}$ @ 8 50,	986 83
" weighing metal,	14 50
" drayage to yard 40,	46 40
"29 Jan., '55— " re-weighing metal,	14 00
" advertising,	3 00
" storage 7 months,	117 60
" commissions, advancing charges \$1218 $\frac{11}{16}$ c 2 $\frac{1}{2}$,	30 48

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" int. and ch'g's 1218 $\frac{7}{10}$ 13	
mo's, 10 per ct. pr an'm,	132 06
" commissions on sale $2\frac{1}{2}$	
per cent.,	70 22
	<hr/>
	\$1,569 09
" Net amount due 1st August, 1856,	\$1,239 09
<hr/>	
" 15 Oct. '53—to my account p 25 Sept., 6 mo's,	\$2,000 00
" 10 Mar. '54 " " " 28 Feb., 5 "	2,000 00
" 20 " " " " 15 Mar., 4 "	2,000 00
" 7 Aug., '55—int. to date, 10 per ct. per an.,	
" \$2,000, 16 months, 9 days 163, 271 67	
" 2,000 12 " 7 " 122 38, 203 89	
" 2,000 12 " 20 " 126, 67, 211 11—	686 67
	<hr/>
	\$6,686 67
" 22 Apr. '54—by check on N. Y. 2,000, \$2,025 00	
" 7 Aug., '55—interest on 2,025 15 mos 160,	263 13
" 1 " '56—net sales of pig metal,	1,239 09
" Interest thereon 6 days,	207 00—
	<hr/>
" Balance due me,	\$3,157 96

When the case was called in its order, at the March Term, 1860, and a Jury had been impannelled to try the same, the presiding Judge, on motion of the defendant's counsel, and after argument had thereon, passed the following order to-wit:

"The answer of the defendant having come in, it is ordered by the Court that the injunction in said case be dissolved, for the purpose of trying the Common Law case enjoined by the bill, and that the said Common Law case proceed to trial, and that the defendant have leave to use the discovery, if he desires it, in defence of said Common Law case."

The decision of the Court granting this order, and refusing to permit the complainant to try this Equity cause alone, constitutes the errors assigned in this case.

MILNER & PARROTT, for the plaintiff in error.

AKIN, represented by LESTER, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

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When the answer came in to the bill filed in this case, a motion was made by the complainant to dissolve the injunction, which was to restrain the Common Law action until discovery and relief could be had under the bill. This motion was refused, and the Judgment of the Court brought up to this Court by writ of error, praying a reversal. The Judgment of the Court below was affirmed. We cannot understand, therefore, why, when the Equity cause was reached, in its order, the injunction should have been dissolved, and the Common Law action ordered to be tried. We think the *ad interim* injunction should have been continued until a final decree was rendered under the bill, upon all the issues made by the bill which included the same matters that were involved in the Common Law case. It might have resulted in a perpetual injunction of the proceeding at law, and thus have saved one trial, at least.

For myself, I should gladly have availed myself, as a matter of policy, of the direction which His Honor the presiding Judge gave to the litigation—with the admissions of Buchanan in his answer—that the acceptances upon which his suit is brought, were made upon the faith of the iron which was to be forwarded to him by Ford, to be sold by him, and the proceeds applied to the drafts—and that the same had been received, but instead of being disposed of in the market according to his agreement with Ford, had been appropriated to his own use. I cannot see how there could have been a recovery in his favor. At any rate, the whole burden of showing that the iron had been fairly accounted for, would have devolved upon him.

Still, the counsel of Ford preferred to take the other course; and he, no doubt, understood the management of his case better than we do. It was his right, we hold, to insist upon trying the Equity cause—when reached and called in its order—and no doubt, all the Equities between the parties can be better adjusted in this way.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in dissolving the injunction, and ordering the action at law to be first tried.

GLENN vs. BLACK et al.

1. In a suit by the Sheriff for the use of a plaintiff in execution, against a purchaser at Sheriff's sale, under the Act of the 27th Dec., 1831, *Cobb's Digest*, 513, the execution under which the sale was made, must be introduced in evidence, or its absence satisfactorily accounted for.
2. If neither put in evidence or accounted for, a verdict for plaintiff would be without sufficient evidence to support it.
3. The Sheriff, who is plaintiff in such a case, is an incompetent witness, unless indemnified against the cost. Otherwise as to a Deputy Sheriff, who neither made the sale, nor is a party to the suit.
4. The *fi fas* in favor of the usees, named in the declaration, against the defendant whose property was sold, are proper evidence in the cause to show their interest.
5. It is not a misjoinder in such an action, to introduce as usees of the plaintiff, several plaintiffs in execution, whose interest is of the same nature, and who all claim a participation in the fund sued for; and if any such be omitted, through mistake or accidentally, the omission may be supplied by amendment.
6. No recovery can be had under this Statute in favor of a plaintiff in execution, who negligently or covinously failed to place his execution in the Sheriff's hands, until after the sale, against a purchaser, himself a junior plaintiff in execution, who levied on the property, brought it to sale, ascertained what liens were in the Sheriff's hands—purchased only to secure his own debt, or a portion of it, and after the sale offered to settle with the Sheriff, by paying off all *fi fas* in his hands at the time of the sale, older than his own, and by crediting the remainder on his own execution; nor in favor of any plaintiff, whose execution the purchaser offered to pay after the sale.
7. This case is distinguished from that of a contest for money actually in the Sheriff's hands.

Assumpsit, in Chattooga Superior Court. Tried before Judge WALKER, at the March term, 1860.

This was an action brought by Charles D. Black, as Sheriff of Chattooga County, for the use of divers judgment creditors of Little B. Strange, against Jesse A. Glenn, to recover the purchase price of a lot of land sold by said Sheriff, at Sheriff's sale, as the property of said Strange, and bid off by said Glenn.

On the trial of the case in the Court below, the evidence disclosed the following state of facts:

On the first Tuesday in January, 1857, the plaintiff sold at Sheriff's sale, in due form, lot of land number 30, in the

Glenn vs. Black et al.

5th district of the 4th section of originally Cherokee, then Chattooga County. The lot of land was sold as the property of Little B. Strange, by virtue of a writ of *feri facias*, issued from the Superior Court of Chattooga County, in favor of Leander W. Crook, against Little B. Strange, and was bid off by the defendant, Jesse A. Glenn, at the sum of \$325, who requested the Sheriff to put the land down to Crook, whom he represented. Sheriff refused. Whilst the sale was going on, Glenn was told by the Deputy Sheriff that there were other older *fi fas* in the office; to which Glenn replied that he would pay them off. When the land was knocked off, Glenn announced to the Sheriff that he was ready to settle his bid, and proposed to pay off the older *fi fas* in the Sheriff's hands at the time of the sale, and appropriate the balance of the bid as a credit upon his own *fi fa*. From some cause, the Sheriff did not make the settlement at that time. Afterwards, and on the same day, there were placed in the hands of the Sheriff to claim the money, the following *fi fas* from a Justice's Court of Chattooga County against the said Little B. Strange, to-wit: 2 in favor of William E. Adger & Co.; 2 in favor of McKenzie, Cadow & Co.; 3 in favor of Thomas G. Barker; 1 in favor of John Taylor; 1 in favor of Branon & Myers; 1 in favor of Kerrs and Hope; 1 in favor of T. T. Hopkins; and 1 in favor of James McClung. After these *fi fas* were put into the Sheriff's hands, he then told Glenn that the calculations were made, and that he was ready to settle. When Glenn saw these Justice's Court *fi fas*, he told the Sheriff that he would not pay them; that he would only pay off such *fi fas* as were in his hands at the time of sale, and credit the balance on his own *fi fa*. The Sheriff declined to settle on those terms. No special or formal demand for the amount of the bid was ever made. The only *fi fas* levied on the land, and in the Sheriff's hands at the time of the sale, except that of Crook, under which it was sold, were those in favor of Penn, and of Lucinda Arnold. Those *fi fas* were in evidence on the trial, as were the Justice's Court *fi fas* aforesaid; but the *fi fa* in favor of Crook, under which the land was sold, was neither put in evidence, nor its absence accounted for. The Sheriff testified, that he did not sell the land under any *fi fa* in evidence. When the plaintiff himself, and his deputy, were offered as witnesses, counsel for defendant objected to their testifying, on the

ground of interest. So far as the plaintiff was concerned, it was proposed to indemnify him against the costs of the case, and the trial proceeded as if the indemnity had been given, though it was not in fact given. The Court overruled the objection as to the Deputy Sheriff, and defendant excepted.

When the plaintiff offered the aforesaid *fi fas* in evidence, (the *fi fa* in favor of Crook being absent and unaccounted for) counsel for defendant objected to the testimony, on the ground that the land was not sold under either of said *fi fas*.

The objection was overruled by the Court, and defendant excepted.

During the trial, the plaintiff proposed to amend his declaration by inserting, as additional usees to the plaintiff, the names of William Penn, Lucinda Arnold and others; to which amendment counsel for the defendant objected, upon the ground that the same would be a misjoinder of parties, as the interests of the persons whose names it was proposed to insert were adverse to each other, and on the ground that the land was not sold under the *fi fas* in favor of any of said persons, except Penn.

The Court overruled the objection, and defendant excepted.

After the testimony was closed, the defendant's counsel asked the Court to charge the Jury—

1. That the plaintiff was not entitled to recover in this case, not having shown any valid *fi fa* under which the land mentioned in the declaration was sold, and not having accounted for the absence of such *fi fa*.

2. That the Jury could not presume a sale of the land under any of the *fi fas* read in evidence, on account of a levy made in 1855, especially when the Sheriff himself testifies that he did not sell the land by virtue of any of the *fi fas* submitted in evidence.

3. That the various usees of the plaintiff could not join in the same action to recover the fund sued for, when it was apparent to the Court and Jury that there were other parties entitled to participate in the fund, or when it was apparent that no valid sale had been made to authorize a recovery.

4. That a deed must have been tendered, and a demand of the bid made, before the plaintiff can recover.

The presiding Judge declined to give said charges, but charged the Jury:

That it must be shown, that the defendant was required to comply with the terms of the sale and failed, or refused to do so; that the plaintiff must show a sale by the Sheriff under an execution which must be produced, or its absence accounted for, and that the defendant was the purchaser; that the possession by the Sheriff of *fi fas* with levies on the land at the time of the sale, was evidence which the Jury might consider to show that he was legally seized of the land, and authorized to sell it; and that though they could not presume a sale from the levies, yet it was evidence for them, and they must determine from all the evidence in the case, whether any sale under a valid *fi fa* had been proved; that the *fi fas* introduced were admitted for the purpose of showing that the usees were interested in the suit, and are not mere interlopers; that the Jury must recollect the testimony, and from that determine whether there was any sale made under them or any of them. If there was any such sale made under either of said *fi fas*, then the Jury would be authorized to find that a sale had been proven; that parties have a right to claim the proceeds of the sale at any time before the money is paid out by the Sheriff. A levy on the land and a sale under such levy must be proved; the sale need not be proved by writing, but it must appear that the sale took place by virtue of a valid execution; that if the Jury find the principal for the plaintiff, interest was also due from the day of sale.

The charge as given, and the refusal to charge as requested, were excepted to by defendant's counsel.

The Jury returned a verdict for the plaintiff for \$325, with interest from the first Tuesday in January, 1857.

Counsel for defendant then moved for a new trial, on the grounds—

1. That the verdict is contrary to the charge of the Court.

2. That it is contrary to evidence, and without evidence, and decidedly against the weight of evidence.

3. That the Court erred in allowing the Sheriff and his deputy to testify in this case.

4. That the Court erred in admitting in evidence the *fi fas* objected to.

5. That the Court erred in allowing the plaintiff to amend his writ, over the objections of defendant's counsel.

6. That the Court erred in charging as he did, and in refusing to charge, as requested by defendant's counsel.

The presiding Judge overruled the motion for a new trial, and such refusal is the error complained of in this case.

L. W. CROOK, by GLENN, for plaintiff in error.

A. R. WRIGHT, for defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

1. The first exception presented by the record in this case is, that the verdict is contrary to the charge of the Court.

The Court charged the Jury, "that the plaintiff must show a sale, by the Sheriff, under an execution, which must be produced, or its absence accounted for." The brief of evidence in the record shows, that the land was sold under the execution in favor of Leander W. Crook, and under no other, though two others which were in evidence had been levied on the land more than a year previously, but were permitted to lie inactive in the Sheriff's hands. After all the executions had been put in evidence, the Sheriff testified, positively, that he did not sell the land under any of the *fi fas* in evidence. The execution of Crook was not in evidence, nor was its absence accounted for. The charge of the Court on this point was certainly correct, and the verdict of the Jury was contrary to it. This was one of the grounds on which the defendant moved for a new trial, and the Court erred in not granting that motion.

This would itself be a sufficient reason for sending the cause back to be re-tried, but as there is a more important question in reserve, which must recur on any subsequent trial, we deem it proper to dispose of all the questions raised by the Bill of Exceptions.

2. Having held, in considering the first exception, that the execution under which the Sheriff sold the land, was an essential part of plaintiff's proof, unless its absence were satisfactorily accounted for, and secondary evidence supplied; and such proof being wanting, it follows that the verdict was without sufficient evidence to support it, and this was ground for setting aside the verdict.

3. The Sheriff was an incompetent witness, unless indem-

nified against costs. This seems to have been recognized by all parties, and the statement in the record is, that the plaintiff proposed to indemnify him, (i. e., the usees or beneficiary plaintiffs,) and the cause proceeded as though he had been indemnified; but in point of fact he had not been. All this amounts to a waiver on the part of the defendant below, and we did not understand him as insisting on this exception in this Court. No sufficient reason was suggested in the argument, and none occurs to us, for holding that the Deputy Sheriff was an incompetent witness. He was no party to the suit, could have no interest in the plaintiff's success, and was not in any way liable for costs. There was, therefore, no error in these rulings.

4. The several *fi fas* in favor of the plaintiff's usees being offered in evidence, were objected to, and plaintiff in error excepts, that the Court erred in overruling the objection and admitting the *fi fas*. They were not offered or admitted for any purpose, other than to show the interest of the plaintiffs as usees, and for this purpose were not only proper, but necessary evidence. The Court did not err in admitting them.

5. The plaintiff, at the trial term, moved to amend his declaration by adding other usees than those originally named in it. This amendment neither introduced a new cause of action, nor in any way varied the liability of the defendant. Technically speaking, it did not change the party plaintiff. The Sheriff is the party plaintiff; with him the contract set out in the declaration was made. The usees are introduced to show, in the language of the statute, who is, or are, interested in the enforcement of the contract. If any party having an interest identical with the usees named in the declaration, be accidentally omitted, it would be proper and just that the omission be supplied by amendment. It was argued that there was, by this amendment, a misjoinder of plaintiff's. But there was, in reality, after the amendment, but one plaintiff, viz: the Sheriff. He is the party authorized to sue. He has discretion in such cases, either to proceed against the recusant purchaser for the whole amount of his bid, or to re-sell the property, and hold him liable for any loss that may result.

There can be but one recovery for such failure, or refusal to comply with the terms of the sale, and as the Act provides that the Sheriff shall sue for the use of the party interested, all persons so interested should be joined as usees. The

money recovered, if any, goes into the Sheriff's hands, and he is subject to the order of the Court, in distributing it among the usees. The amendment was properly allowed.

6. The sixth and last exception is, that the Court erred in the charge to the Jury.

The chief objection under this exception, which brings up the most important question in the case, is to that part of the charge thus expressed: "That parties have a right to claim the proceeds of the sale at any time before the money is paid out by the Sheriff." With this proposition as applied to money actually in the hands of the Sheriff, we have in this case no concern, and must not be understood as dissenting from it in that sense. We, however, distinguish money in the Sheriff's hands, from money for which he is compelled to sue, and the recovery of which may be resisted on various grounds. An idea seems to obtain, to a greater or less extent, that nothing more is necessary to insure a recovery under this Statute, than to prove a sale by the Sheriff with competent authority, and that the defendant made the last, or highest bid, and then failed, or refused to comply with the bid. In *Collier vs. Perkerson*, at the present Term, we have given a different construction to the Statute, holding that the Legislature did not intend to make the particular class of contracts embraced in its provisions more sacred than any other—did not intend to deny to the party sued a defence. Had this Statute not been passed, the remedy of the usees would have been by Bill in Equity for a specific performance of the purchaser's contract. Were they now pursuing that remedy, the defendant "*might insist upon any matter which shows it to be inequitable to grant such relief.*" 1st Story's Equity, §161. By our construction of the Statute, the Legislature intended only to change the remedy—to make it more summary, and less expressive, leaving to the defendant all the defences of which he might in the other procedure have availed himself. If he can show that, owing to ascertained laches, or covinous concealment, or positive fraud of the party seeking to enforce the contract, he had been induced to purchase, when, with a full knowledge of all the circumstances of plaintiff's claim, and that it would be asserted, he would not have done so, he should not be held liable.

In the case at Bar, the land was sold under Crook's execution. The defendant represented Crook as his Attorney at

Law, Crook not being present. The case stands, then, as though Crook, the plaintiff in execution, had been the purchaser, and were now the defendant below.

All the circumstances indicate that Crook's object was to procure satisfaction of his debt, or some part thereof, rather than to acquire title to the land. To secure this object, he was willing to purchase the land at its full value. He therefore caused a levy to be made on the land, and brought it to sale. Like a vigilant creditor, and a careful man, when the time of sale arrived, he ascertained what liens upon this land were in the Sheriff's hands. Finding only two, there, viz: the execution of Penn and Arnold, (two of the usees,) both of which had been levied on the land, (though not pressing it to sale,) and both of superior lien to his own, he determined for himself what price he would give for the land, knowing that so much of the purchase money as the two superior liens called for must be paid upon them, and reasonably calculating that the remainder would be credited upon his own *fi fa*, was induced to purchase. In the course of the bidding, he is informed by the Deputy Sheriff, who supposes he may be ignorant of the fact, that there are *in the Sheriff's hands*, to claim the proceeds of the sale, older *fi fas* than his own. He replies, that he is aware of that, and would be prepared to pay them off, and have the balance of the purchase money credited on his own. Having purchased the property, he forthwith informs the Sheriff that he is prepared to settle in that way. The Sheriff makes no objection, but, for some reason, (probably pressure of other official business,) defers the settlement to a later hour. At a subsequent time, on the same day, the Sheriff informed the plaintiff in error that the calculations had been made, and he was ready to settle with him. They proceeded to a settlement, when the Sheriff produced sundry Justices' Court *fi fas*, older than that of the purchaser, which had been placed in his hands to claim money subsequent to the sale. The purchaser then refused to pay money to be appropriated to the satisfaction of those *fi fas*, but again offered to pay all that might be due on the *fi fas* in the Sheriff's hands at the time of the sale, of older date than his, and claimed to have the remainder credited on the latter. The Sheriff declined to make such settlement, and this suit was instituted. There is no proof that the purchaser knew of the existence of those Justices' Court *fi fas*; and

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had he known of their existence, he could not know but that they had been satisfied. He had used diligence to ascertain what liens were then brought forward to be asserted against the land about to be sold by his own diligence. Had those *fi fas* been placed in the Sheriff's hands before the sale, he would have known it, and it is morally certain, he would not have become the purchaser; because his whole conduct shows that his object was not to acquire the land sold, but to secure his debt.

Why were not those Justices' Court *fi fas* placed in the Sheriffs' hands before the sale? Clearly, either from laches, or in the practice of a cunning stratagem to induce the levying and selling creditor to compete as a bidder, under the expectation of having the purchase money credited on his execution, thus substituting the land for the judgment debt. The fact that the executions were, so soon after the sale, placed in the Sheriff's hands, is suggestive of the idea, that their owners were present with them in their pockets all the while, cunningly, rather than negligently, concealing their existence, and the use to be made of them. To us, it seems clear enough, that either by the laches or covin of the owners of those *fi fas*, the plaintiff in error was induced to make a purchase which he would not otherwise have made, and this constitutes a good defence against *their* attempt to coerce payment of the purchase money. As to those two useses whose *fi fas* had been levied on this land long anterior, and which were in the Sheriff's hands at the time of the sale, the defence of the plaintiff in error against them stands on a different footing. He had offered to pay those *fi fas*, and he may, indeed *must* be presumed to have been ready and willing to do so whenever the Sheriff would settle with him on the terms proposed. To such settlement we think he is entitled. To prevent misapprehension, we repeat, that we distinguish this case from the case of a claim of money actually in the Sheriff's hands.

We think the charge of the Court on this point was erroneous, and for this reason, as for other errors specified, we reverse the Judgment of the Court below.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court,

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that the Judgment of the Court below be reversed, and a new trial ordered. First, on the ground that the *fi fa* under which the Sheriff was alledged to have sold the property, for the purchase of which defendant is sought to be held liable, was neither put in evidence nor accounted for; and in this the verdict was contrary to Law and the charge of the Court, and unsustained by evidence. Secondly, on the ground that the usees, who were plaintiffs in execution, placed in the Sheriff's hands after the sale, and after the defendant had offered to settle with the Sheriff according to his bid, are not entitled to this statutory remedy against a vigilant creditor, who purchased with reference to liens in the Sheriff's hands, and with a view to secure his own debt; and that the other usees brought in by amendment are not entitled to this remedy against him, because before suit brought defendant had in good faith offered to pay their *fi fas* out of the purchase money.

PURSLEY vs. RAMSEY.

1. The liability of one of two defendants, depending upon the question whether he was the partner of the other, who signed a note sued on with a signature purporting to be that of a firm, and of articles of partnership between them being offered in evidence, and their execution proven, it is not competent for the defendant, resisting a recovery against him, on cross-examination to ask the witness who proved the execution of the articles: what was said between the parties contracting, immediately after the execution of the articles, as to reason why a firm-name was not adopted, and also as to the right of one partner to sign the name of the other.
2. In such a case, it is competent for the plaintiff, by proving dealings of the defendants with other persons, before the making of the note sued on, to show dealings on joint accounts, the use of a firm-name, and its recognition by both parties.
3. It is not necessary that a firm-name be inserted in the articles of partnership. The name in which their business is done, and by which they are generally known, becomes legitimately their firm-name.
4. Declarations of one partner, in the course of casual conversations, are incompetent to show either a dissolution of a partnership, or, (if that were established by other evidence,) to affect parties not present, with notice of a dissolution. Public or personal notice of a dissolution of a co-partnership once existing, is necessary to affect persons not previously dealing with the firm.

Certiorari, in Catoosa Superior Court. Decided by Judge WALKER, at the May Term, 1860.

The record in this case discloses the following state of facts, to-wit:

Reynold A. Ramsey and others, brought various suits in the Justices' Court of 1095th district, G. M., of Catoosa county, against Robert Ware and Thomas K. Pursley, to recover the amount of divers promissory notes, purporting to be signed by "R. Ware & Co.," and by "T. K. Pursley, by R. Ware."

To these cases, Thomas K. Pursley pleaded *non est factum* in due form, and averring in his plea that he had never authorized Robert Ware as his agent or partner, or in any other way or manner, to sign said notes for him.

At the trial term of said cases, judgments were rendered in favor of the plaintiffs against the defendants, Robert Ware and Thomas K. Pursley.

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From these judgments Pursley entered appeals, and at the trial term of the appeal, it was agreed by the counsel of the parties that all the cases should be tried together, and that one verdict should determine all the cases.

When the notes sued on were offered in evidence, they were objected to by the counsel for the defendant, on the ground that but two of the makers of the notes were sued, and that the Law required all of the makers of a joint note to be sued together, and that in the case of a joint and several note, either one or all of the makers must be sued. The objection was overruled and the notes admitted, to which defendant excepted.

Plaintiff then offered in evidence articles of partnership between Ware and Pursley, to which counsel for Pursley objected, on the grounds—

1st. That the articles of partnership did not authorize Ware to bind Pursley individually, and that, if such partnership existed, Ware had no power to bind Pursley, except as a partner, and in this case he signed Pursley's name not as partner, but as agent.

2d. That, even if the question of partnership were involved in this case, the articles showed authority to bind Pursley only in January, 1857, when the contract was made, if at all, and not such authority in October, 1858.

The objection was overruled, and the evidence admitted, to which defendant excepted.

Counsel for defendant proposed, in cross examination of J. J. Smith, the witness by whom the execution of the articles of partnership was proved, to ask him what was said between Ware and Pursley, as to why a firm-name was not inserted in the articles, and also as to the right of one partner to sign the name of the other, the conversation occurring immediately after the execution of the articles.

The testimony was objected to by the plaintiff's counsel, and repelled, to which the defendant excepted.

Plaintiff, also, proved that the notes sued on were given for stock, and that the names were signed by Ware—Pursley being then absent with stock to sell; that Pursley bought stock in the fall of 1858, and gave his note therefor, which note Ware endorsed, and that Ware left the county the day after the notes sued on were given; that Ware and Pursley had given other notes for stock, signed by them individually,

and in one instance, Pursley, after going and selling the stock, returned, and when the note was presented to him, he recognized it as right, and promised to pay it; that, in another instance, notes signed by Ware, exactly similar to the notes sued on, were given for borrowed money, in 1857, and when presented to Pursley, he seemed surprised and astonished that such notes were in circulation, avowing that Ware had no authority to sign his name to the notes, but said that the holder should lose nothing, and afterwards paid the note, requesting the holder to say nothing about it; that this transaction occurred soon after Pursley returned from market with stock; that, in another instance, Ware gave notes signed like those sued on for borrowed money, to be used in buying stock, and that, after Pursley returned from market with the stock, he and Ware gave new notes for the old ones, signing each his own name.

Counsel for defendant objected to all this testimony, because it all related to transactions before the notes sued on were given, and showing, as it did, only an implied authority to make notes a considerable time before the date of the notes sued on, did not illustrate any issue in this case.

The objection was overruled, and defendant excepted.

Plaintiff, also, proved a conversation with Pursley in relation to a letter written by Pursley, in which he said that the eight hundred dollars he had sent to Ware was his proportion of the mules he had bought for him in the Cove.

The plaintiff then closed, and counsel for defendant proposed to prove that, prior to the giving of the notes sued on, Ware took up the articles of partnership between him and Pursley, from the person with whom said articles were deposited, and said that the partnership was dissolved, and that before the giving of the notes sued on, Ware had repeatedly, and to divers persons, declared that the partnership was dissolved.

The plaintiff's counsel objected to this testimony, and the Court repelled the evidence, to which defendant excepted.

Counsel for the plaintiff whilst addressing the Jury in conclusion, stated that the horses and mules for which the notes sued on were given, had been appropriated to the individual debts of Pursley, which statement was unwarranted by the testimony; also, the said counsel, in conclusion, read to the Jury a case from *20th Georgia Reports, of Collins et al. vs.*

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Cross et al., which, he said, was just like the case then on trial, and that defendant's plea was insufficient, which case was not read by the counsel who opened the case for the plaintiff, nor was any objection to the plea taken before the Court; said counsel, also, remarked in the hearing of the Jury, just as they were retiring to consider the case, that it was a plain case, and that it would not take the Jury five minutes to make up a verdict.

The Jury returned a verdict in favor of the plaintiff for the amount of the notes sued on.

The case was taken by Writ of Certiorari to the Superior Court of Catoosa county, and the presiding Judge, upon the facts before stated, and after argument had thereon, dismissed the Certiorari, and affirmed the Judgment of the Justice's Court, and this decision constitutes the error complained of in this case.

W. K. MOORE, for the plaintiff in error.

W. H. UNDERWOOD, for the defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

1. The first error complained of in this case is, that the Court, of original jurisdiction, permitted the notes sued on to be read in evidence, overruling the objection of plaintiff in error, that but two of the makers of the notes were sued, whereas "the Law requires all of the makers of a joint note to be sued together, and that in the case of a joint and several note, either one, or all of the makers must be sued."

The notes in suit were signed "R. Ware & Co.," "T. K. Pursley, by R. Ware." The objection assumes that the signature "R. Ware & Co." represents a plurality of persons, of whom the plaintiff in error is not one; but that no where appears. It is insisted throughout by the defendants in error that, if R. Ware had no authority to bind the plaintiff in error by his individual signature, he nevertheless had authority to bind him as a partner; that there was a partnership existing between them in a particular trade; that the notes sued on were given in the course of that trade, and that the signature of R. Ware & Co. represented that partnership. In the absence of proof, therefore, that that signature re-

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presented a firm, or a plurality of persons, of whom plaintiff in error was not one, this objection is simply begging the question. If intended to represent Ware and Pursley, and no other, then there were but two signers of the notes, and they were both sued. That objection to the notes, as evidence in the cause, was certainly not well taken.

2. The articles of partnership between Ware and Pursley being offered in evidence, plaintiff in error objected, first, because "the articles of partnership did not authorize Ware to bind Pursley individually, and that, if such partnership existed, Ware had no power to bind Pursley, except as partner, and in this case he signed Pursley's name not as partner, but as agent."

This objection, like the other, assumes that the defendants in error did not seek to hold the plaintiff in error bound under the signature of R. Ware & Co., whilst we understand, from the whole conduct of the case in the Court of original jurisdiction, as disclosed by the record, as well as by the argument before us, that they not only held him so bound, but that was their chief reliance. If the signature of R. Ware & Co. did bind Pursley, a futile attempt to bind him further by his individual signature, did not discharge him from the partnership liability. Why, upon the hypothesis that he was a partner in the firm of R. Ware & Co., Ware sought to bind him individually, does not appear, nor need we inquire. The plaintiff's object on the trial was, to prove him bound by one signature or the other, and it was their privilege to insist upon both. The articles of partnership were certainly relevant evidence, and that disposes of this objection on the first ground taken.

But this objection is urged, secondly, on the ground "that, even if the question of partnership were involved in this case, the articles showed authority to bind Pursley only in January, 1857, when the contract was made, if at all, and not such authority in October, 1858," (the date of the notes.)

This position (conceding for the argument that there were articles of partnership, conferring on Ware authority to bind Pursley as partner) assumes that such authority was limited to January, 1857. The answer is, that it was necessary for the Court and Jury to have before them the articles, that they might ascertain the duration of that authority. If, upon examination of the articles, it appeared that the partnership

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did not expire by its own limitation before the date of the notes in suit, then any authority they may have conferred on Ware to bind Pursley, continued until the making of the notes, unless the partnership were previously dissolved, and the onus of proving a dissolution was upon the plaintiff in error. It would seem, then, that the objection to this evidence was properly overruled.

3. On the cross examination of the witness who proved the execution of the articles, plaintiff in error asked him what was said between the partners, Ware and Pursley, immediately after the execution, as to the reason why a firm-name was not adopted, and also as to the right of one partner to sign the name of the other. Objection being made, the question was ruled out, and that is assigned as error.

This evidence could have no possible effect, unless by varying the terms of the articles of partnership—by proving a contract of partnership, different from the written articles, which is inadmissible. It is an attempt to show a limitation in parol, fixed at the time of signing the articles, upon the power of one party to bind the other, and that, too, in prejudice of the right of strangers to the articles, who subsequently dealt with the firm. Authorities to this point are abundant, but it is enough to cite one from the decisions of this Court—

“Parol evidence is inadmissible to prove any contract, different from the written agreement, unless from *fraud, accident, or mistake*, the instrument fails to speak the intention of the parties.” *Wynn, Shannon & Co. vs. Cox*, 5 *Georgia Reports*, 373.

4. Several witnesses were offered to prove dealings of the plaintiff in error and R. Ware, with divers persons, after the execution of the articles of partnership, and before the dates of the notes in suit, showing purchases made by each on joint account, and on credit, the manner in which notes were given in the course of their dealing (in several instances precisely such as these,) and the subsequent payment of them by the plaintiff in error.

Plaintiff in error objected, and the objection was overruled.

In a case like this, where one partner denies the authority of the other to bind him in a particular transaction, it is certainly competent to show that by their general course of dealing, the authority to bind in like cases, as by the use of

a particular partnership name, had been recognized and acted upon by him. It is not necessary that a firm-name should be inserted in the articles of partnership. The name in which their business is done, and by which they are generally known, becomes legitimately the firm-name. *Collyer*, § 215, and *Note 3*. *Citing: 2 Peters' Reports*, 198.

5. Plaintiff in error sought to show a dissolution of the partnership by proving that, prior to the dates of the notes sued on, Ware had withdrawn the articles of partnership from the person in whose custody they had been placed by consent, saying that the partnership had been dissolved; and by proving that Ware had stated the same thing to diverse persons, at sundry times, before the making of the notes sued on. Objection being made, the Court ruled out the evidence, and to this ruling plaintiff in error excepted. The evidence offered was incompetent to prove either a dissolution of the co-partnership, or notice thereof (had there been no other proof of it) to the defendants in error. The co-partnership cannot be dissolved, or, in other words, the liability of the partners cannot be prevented, *quoad* third persons, without notice to them, and to the world in general, that the co-partnership no longer exists. *Collyer on Partnership*, § 120. *Citing: Lucas vs. The Bank of Darien*, 2 *Stewart*, 280.

A co-partnership once entered into is presumed to continue, as to third persons, until notice is given. *Thurston vs. Perkins*, 7 *Missouri*, 29. *Princeton & Kingston Turnpike Co. vs. Gulich*, 1 *Harr.*, 160.

Public notice of dissolution must be given, to affect persons not previously dealing with a partnership, and actual notice to dealers. *Collyer*, § 532, and *Note 3*.

The evidence offered would have been good against Ware, but not against third persons.

6. Plaintiff in error, further, insists that the verdict of the Jury is contrary to Law and evidence.

It appears from the record that there were in evidence, on the trial, articles of partnership between Ware and Pursley, though they are not in the record. There was, however, abundant evidence that they were jointly interested in a trade, carried on in buying and selling horses, mules, &c.; each occasionally buying, and each selling—one selling what the other had bought. Some, at least, of the notes in suit were given (as proven) for such stock as they dealt in. Notes

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signed, as were these, by Ware, in consideration of such stock purchased, whilst Pursley was absent, selling stock, were, in some instances, paid by Pursley, and in others, on his return taken up, and the joint and several notes of Ware and Pursley substituted for them. In one instance, only, Pursley, having a note, signed as are those in suit, presented to him, expressed surprise—but subsequently paid it with a *protestando* against the authority of Ware to bind him.

On a careful review of all the testimony, we are of opinion that the Jury were justified in finding the existence of a partnership, and that the plaintiff in error was bound by the signature R. Ware & Co. to the notes. It was not necessary that a firm-name should be agreed upon in the articles of partnership. If there were evidence of an agreement to buy and sell on joint account, for mutual profit, and if one with the knowledge and assent express or implied of the other, was in the habit of using the name used in this case, that is sufficient.

The Judge of the Superior Court sustained all the rulings of the Justices' Court, and the verdict of the Jury, on hearing of the Certiorari, and we affirm his Judgment.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be affirmed.

McAFEE vs. THE STATE OF GEORGIA.

1. The Law providing that the Superior Court for any county shall be holden on the fourth Monday in April, and the first Monday in May, if it occur that there are five Mondays in April, the Court may be holden during the week intervening between those commencing on the fourth Monday in April and the first Monday in May, without violation of Law.
2. The Law providing, that in the same county, the Judge of the Superior Court shall draw a panel of Grand Jurors, and a panel of petit Jurors, for each week of the term of the Superior Court, does not disqualify a Juror from serving more than one week of the Term. It, at most, only confers a privilege of exemption, which may be waived. And if the same Jurors who served during the first week, voluntarily serve during a week intervening, as stated in the previous note, and a defendant in a criminal case consent to be tried during that week, and fail to challenge the array of Jurors when presented, a motion in arrest of Judgment after conviction, will not be sustained.
3. If a defendant on trial for stabbing, give in evidence, a previous difficulty or quarrel on the same day, to show a conspiracy of several to do him bodily harm, it is competent for the State to prove other incidents of the same previous difficulty, to the end that the Jury may the better understand the merits of the case.
4. In such a case it is no objection to the competency of a witness on the part of the State, or to his testimony, that he is one of the parties charged with conspiracy, and that his testimony tends to exculpate himself, if it rebut the conspiracy attempted to be proven.
5. Under an indictment for stabbing, if the evidence show that the prosecutor and defendant agreed to fight—the prosecutor being entirely unarmed, and the defendant commenced from the first to use a knife, stabbing the prosecutor at every blow—it is not a case of self-defence, and a verdict of guilty is sustained by the Law and the evidence.
6. In such a case, a motion for a new trial, on the ground of newly discovered evidence, is properly refused, if it appear, first, that two of the witnesses whose evidence is alleged to have been newly discovered were subpoenaed by the defendant, and in attendance, and that the third proves the same facts as they—due diligence not having been shown; secondly, that the newly discovered evidence is only cumulative; thirdly, that their knowledge, showing a conspiracy had not been communicated to the defendant before the stabbing; fourthly, that the newly discovered evidence would not, probably, and should not have varied the result.

Indictment for stabbing, in Whitfield Superior Court.—
Tried before Judge WALKER, at the April Term, 1860.

Juan McAfee was indicted in the Superior Court of Whitfield county, for the offence of stabbing William O. Fincher.

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The defendant was put upon his trial on the 4th day of May, during the week intervening the fourth Monday in April and the first Monday in May, 1860.

The testimony adduced on the trial in the Court below, developed the following facts, to-wit:

On the 29th day of February, 1860, at the town of Dalton, in the county of Whitfield, William O. Fincher (the party stabbed) and William Fincher, and a man by the name of Fuller, were in the act of starting home—it being near sundown. The defendant was standing a little distance off from the group made up of the said two Finchers and Fuller, when Fuller, who was very drunk, either run up, or staggered up against the defendant. The defendant pushed Fuller off. William O. Fincher walked up close to where defendant and Fuller were, and asked Fuller if he was going to take that, (meaning the push by defendant.) Defendant asked William O. Fincher if he took it up? to which Fincher replied that he had as soon as not. Defendant then said, "here's at you," and commenced pulling off his coat; and did pull it off. Defendant and William O. Fincher made at each other, met, and both struck about the same time—Fincher having no weapon of any kind, and striking with his fist alone, whilst defendant struck with his knife. The first lick made by defendant, with his knife, inflicted a wound on the left side of Fincher's breast, just below the collar bone. The second lick made by defendant, with the knife, inflicted a stab just under the breast bone of Fincher, about the pit of the stomach, and rather to the right side. The third lick cut the left arm of Fincher, just below the elbow. The fourth lick cut the upper portion of Fincher's right arm about midway between the wrist and elbow. Fincher's clothes were cut in another place, which did not reach the skin. The wind would issue from both wounds on the breast as Fincher would breathe. Fincher was unable to work from the time of the cutting up to the time of the trial, and was then unable to work, and could not ride on horseback without much pain.—William O. Fincher testified that he did not see anything wrong in the defendant pushing off a drunk man when he staggered up against him, and when he asked Fuller if he was going to take that, he had no idea of getting into a difficulty, and did not know that the defendant and Fuller had anything against each other. Fincher had no weapon, and

did not expect to have any fight until defendant commenced pulling of his coat.

There was some testimony relative to a quarrel or difficulty between Fuller and defendant, and others, at a barber's shop on the same day of, but prior to the stabbing, in which there were threats made by Fuller and Wm. Fincher about whipping defendant, McAfee, and which has no connection with the fight between defendant and William O. Fincher. Some one gave defendant warning that some of the boys were after him to whip him.

Testimony relative to this previous quarrel or difficulty, was first offered and introduced by the defendant, to which the counsel for the State interposed no objection; and when counsel for the State offered to prove other and additional facts about said previous difficulty, the defendant's counsel objected.

The presiding Judge decided that all the testimony in relation to said previous difficulty, should be ruled out, or all admitted, at the option of counsel for defendant; and that if that portion offered by the State was objected to, he would rule out that portion offered by the defendant—and defendant excepted.

Some of the witnesses testified: That after the fight commenced between the defendant and William O. Fincher, some one in the large crowd standing around, threw a hammer, and some rocks, or brickbats, and that another Fincher had a knife drawn; but that they (the witnesses) did not throw them.

To this defendant's counsel objected, on the ground that such testimony tended to excuse or exculpate the witnesses; which objection was overruled by the Court, and defendant excepted.

The testimony being closed, the presiding Judge charged the Jury:

"The defendant is presumed to be innocent; and it devolves on the State to show, by proof, that he is guilty beyond a reasonable doubt, before he should be found guilty; and in the absence of such proof, he should be acquitted.—When the fact is proved that the defendant did the act of stabbing, this makes out the offence charged, unless it appears from the evidence that the stabbing was done by the defendant in his own defence. The defendant's counsel do not deny

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(as I understand it) that the defendant did the cutting, but they insist that he did it in his own defence; and that is the question which you have to decide under the Law and the facts proved. You are the judges, both of the Law and the facts, and your verdict is a decision of all the questions, both of Law and fact, involved in this case. Before you would be authorized to find the defendant guilty, your minds must be satisfied, from the evidence, of the defendant's guilt; and if your minds be so satisfied, then it is your duty to find the defendant guilty.

"This is an indictment for stabbing; and a general finding of guilty is, that the defendant is guilty of the offence charged.

"Under an indictment for stabbing, the Jury may, if the evidence will warrant it, find the defendant guilty of an assault and battery, or an assault only; or, if no offence be proved to have been committed by defendant, then he should be found not guilty. Our Code declares that, 'any person who shall be guilty of the act of stabbing another, except in his own defence, with a sword, dirk, knife, or other instrument of like kind, shall, on conviction thereof, be punished,' &c. Battery is defined to be 'the unlawful beating of another,' and an assault is defined to be 'an attempt to commit a violent injury upon the person of another.' In this case it is insisted that the stabbing was done in self-defence. If it appears from the evidence that it was necessary for the defendant's defence at the time to stab William O. Fincher, then he is not guilty of stabbing. A man may protect his person by opposing force to force, but the force must not be disproportioned to the character of the injury threatened against his person. A battery with a man's fist will not justify one in defending himself with a knife, unless the use of the knife was absolutely necessary at the time, either to save his own life, or to prevent some great bodily injury being done to his person. A man has no right to use a knife, in order to prevent a person from whipping him with his fists, unless there should be a reasonable ground for the belief that the assailant was about to commit a serious personal injury upon him at the time. The party using a weapon, to be justifiable, must act under a reasonable apprehension that great bodily harm is about to be done him; otherwise he is not justifiable. If these parties proposed to go into a fight, and

McAfee, instead of a fair fight, met the other party and stabbed, and fought with a knife instead of his fist, and stabbed William O. Fincher; under this state of facts, you would be authorized to find the defendant guilty. If a party use a knife and cut another, it must appear that it was necessary for the purpose of preventing serious personal injury at the time, or the party so using the knife will be guilty of stabbing. If a party go into a fight with a knife drawn, pretending to be going into an ordinary fight—or, in other words, if two men go into a fight willingly, and one arms himself before going into the fight, and stabs his antagonist, this would be taking undue advantage, and would authorize the Jury to find the party thus taking advantage, guilty. If two parties enter into an equal contest, both willing to fight, and one prepare a knife and stab his antagonist, this would be a case of stabbing; because, under such a state of facts, the party would have no right to use such a weapon.

“The throwing of the hammer or brickbats after the stabbing—if they were so thrown—or the drawing of the knife by the other Fincher after the stabbing—if it was after the stabbing—affords no justification for the defendant stabbing William O. Fincher. Was the stabbing done, at the time it was done, necessary for McAfee's self-defence? If so, he was justified; otherwise, he was not. If, as the defendant insists, the rocks and hammer were thrown at him before the stabbing, this might justify the defendant, provided the proof shows that there was a common purpose among the parties (including William O. Fincher) to do the defendant some great bodily harm. This is all for your consideration. You are to determine, from all the testimony in the case, whether the defendant is guilty or not. I intimate no opinion as to what I may think has been proved in this case. The whole matter is for your determination; and as you think the testimony will authorize, so you will find.”

The Jury returned a verdict of guilty against the defendant.

Whereupon counsel for the defendant moved to arrest the Judgment in said case on the ground:

“That the defendant was tried on the 4th day of May, during the week immediately following the fifth Monday in April, and intervening between the fourth Monday in April and the first Monday in May; the Court not being adjourned to said time of trial, and no Jury being drawn for said week.

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during which said trial took place, and that said trial was had at a time unauthorized by law."

To this ground of the motion, the Judge adds, by way of explanation and qualification, that during said intervening week, and previous to the trial, counsel for McAfee stated to the Court that whenever it would suit the convenience of the Court to try McAfee, he was ready, and that no objection to the time of trial was made at the time.

The Court refused to arrest the Judgment, and defendant excepted.

Counsel also moved for a new trial of said case, on the following grounds:

1st. Because the Court permitted the State to prove that defendant had a quarrel or difficulty with Fuller and others on the same day of, and previous to, the stabbing—defendant objecting at the time and as before stated.

2d. Because the Court erred in permitting the witnesses to exculpate themselves as before stated.

3d. Because the Court erred in the charge as given, and herein before set forth.

4th. Because the Court was improperly holden, and the defendant was tried and convicted contrary to law.

5th. Because the verdict of the Jury was contrary to Law, and against the evidence, and decidedly against the weight and preponderance of the evidence, and without evidence to support it.

6th. Because of the newly discovered evidence of Lott Gordy, James Maloy and W. P. Hackney—whose testimony was unknown to defendant or his counsel until after the trial—by whom the defendant can prove:

"That when defendant, on the same day, and prior to the stabbing, went into the barber's shop to get shampooed, that James Fuller said to him, "God damn you, if you will come out here, I'll shampoo you," and that William O. Fincher said to Fuller, "Jim, if you can't I can, God damn him;" that when defendant was told not to go out to where Fuller, the two Finchers, Johns and Carson Inman were with their sticks, that defendant replied that he had got out of their way two or three times that day, and that he could not be run over by a crowd of men; that a few minutes before the stabbing, William O. Fincher had a blade of a knife open in his left coat-pocket, and Hackney's attention was called to it

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by Maloy, and Hackney told Johns to make Fincher shut up his knife."

This ground was supported by the affidavits of Gordy, Maloy, Hackney and the defendant.

The presiding Judge adds, that Gordy and Maloy both were subpoenaed in behalf of defendant, and were in attendance upon the Court, although the defendant's counsel stated that they had not conferred with either of the three witnesses, Gordey, Maloy or Hackney.

The Court overruled the motion for a new trial.

Error is assigned upon the decision of the Court, refusing to arrest the Judgment, and refusing to grant the new trial, as moved for.

J. A. GLENN, for the plaintiff in error.

JOHNSON, Solicitor General, by W. K. MOORE, for the defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

After conviction, defendant's counsel moved in arrest of judgment, on the ground that, at the time of his trial, the Court was holden without authority of Law, and its proceedings, therefore, void.

The Statute prescribing the time for the sitting of the Superior Court in Whitfield county, provides that it shall be holden on the fourth Wednesday in April, and the first Monday in May, and on the fourth Monday in October, and first Monday in November of each year. By another Statute it is provided that "the Judge of the Superior Court of Whitfield county is authorized, and required, to draw a panel of Grand, and a panel of Petit Jurors for each week of Whitfield Superior Court, so long as the same shall continue, for the space of two weeks." In the present year, there were five Mondays in the month of April. The crowded state of the dockets indicated, as the result proved, that the business of the Term could not be disposed of in two weeks, and the Judge, at the end of the first week, caused this entry to be made on the Minutes: "The Court took a recess until next Monday morning, 10 o'clock."

The Juries drawn and impaneled for the first week were

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retained for the service of the week commencing with the fifth Monday in April.

The Court below overruled the motion, and counsel for defendant excepted.

One position assumed in support of this motion is, that the Court could not be holden during the week intermediate the weeks commencing on the fourth Monday in April, and the first Monday in May, because the Law specifies only those two days. It is apparent that the same rigid, literal construction would limit each Term of the Court to two days, with an intervening week. The language of the Statute is, on the fourth Monday in April, and first Monday in May. If the Court, in those years wherein April has but *four* Mondays, may sit on all the days following Monday in the week wherein the fourth Monday occurs, why not in those wherein April has *five* Mondays, sit on all the juridical days intervening between the fourth Monday of April and the first of May? There is nothing in the Statute prohibiting such a session, nor any express limitation of the entire term to two weeks. In the absence of such a limitation, or rather of any limitation, a Court, once regularly organized, may sit from day to day, or from week to week, until its business shall be accomplished. The Court was regularly and legally in session.

But it was argued, that if in session, it was without a Jury legally constituted; because the week for which the first set of Jurors was drawn and empaneled had expired. The Law does not disqualify a Juror from serving more than one week in that Court. It extends to him, at most, nothing more than a privilege of exemption after one week's service; but that being a personal privilege, may be waived, and in this case it was waived by all the Jurors.

Besides the statement of defendant's counsel during that week, that the defendant was ready for trial whenever it suited the Court's convenience to try him, together with the omission to challenge the array, was a waiver of all exception on this ground.

Counsel moved for a new trial on sundry grounds, which having been refused, they excepted on each ground.

It is said the Court erred in permitting the prosecuting officer to give in evidence circumstances attending a previous difficulty between the parties, on the same day. Before this

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was done, or attempted by the State, defendant had given evidence relative to that previous difficulty. The evidence offered by the State was to supply omissions touching that difficulty—to add omitted portions of the *res gestæ*, so as to render perfectly intelligible what the defendant had imperfectly brought to the cognizance of the Jury. Upon his objection, the Court gave him the option of withdrawing what had been admitted, or submitting to have what he had omitted received. He did not withdraw, and the Court admitted the entire history. If a party put in evidence matter not pertinent or relative to the issue, he does so at the peril of having all put in by the other party that may be necessary to explain what he has thrust before the Jury. It is on the same principle that a party's sayings may be evidence for himself, if his adversary have proven a part of what he said in the same conversation.

Secondly. It is urged that the Court erred in permitting two of the witnesses to exculpate themselves. I am at a loss to understand from what they were supposed to exculpate themselves, unless it be from an imputation involved in defendant's effort to prove a conspiracy between those witnesses and the prosecutor, to do him some bodily harm; and in this view, it was but rebutting his evidence, and they were competent witnesses.

Thirdly. Exception is taken to the charge of the Court, as objected to on the motion for a new trial. We deem it unnecessary to review these objections in detail; they are numerous, and have been well considered. It is enough to say, we have carefully looked into the charge, and see nothing there of which defendant has cause to complain. It may be that, in speaking of a man's right to defend himself by using a knife or dirk against one who attempted to "whip him with his fist," the Court too much restricted the right of self-defence; but *that* was not defendant's case. What his case was, we shall presently indicate, in considering another exception.

The fourth exception we have considered in disposing of the motion in arrest of judgment.

The fifth exception is, that the verdict is contrary to Law and to the evidence, and decidedly against the weight of evidence.

The Law governing the case prohibits a person from "stab-

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bing another, except in his own defence, with a sword, dirk, knife," &c.

According to the evidence, these are the facts of defendant's case: One Fuller had run, or staggered against defendant, who pushed him off. Prosecutor standing by, and addressing Fuller, said, "Jim, do you take that?" or, "I would not take that," but said nothing to defendant. Defendant said to prosecutor, "Do you take it up?" Prosecutor—"I would as soon as not." Defendant (throwing off his coat,) "Here's at you." The parties then simultaneously approached each other, and both struck about the same time—prosecutor with his fist, (having no weapon at all, not even a cane,) defendant from first to last striking with a knife, and inflicting upon prosecutor's person four or five stabs. Here was a distinct agreement to fight, defendant showing at least as much willingness as the other. Having *agreed* to fight, his first—his every blow inflicted a serious stab upon the person of an unarmed antagonist. This was not self-defence, in contemplation of Law.

The Law and the evidence both sustain the verdict of the Jury.

The last exception is, to the refusal of the Court to grant a new trial, because of newly discovered evidence.

Numerous rulings of this Court, here cited, made it obligatory on the Court below to refuse a new trial on this ground, for the following reasons: Due diligence had not been used; two of the witnesses relied upon having been subpoenaed by defendant, and being in attendance; and the third testifying to the same facts as themselves. By interrogation of them, defendant or his counsel could have ascertained what they knew as well before as after the trial. The testimony was cumulative only, tending to prove a conspiracy against defendant, of which there was some testimony before the Jury. It does not go to the extent of showing that the facts newly discovered had been communicated to the defendant before the stabbing. It would not probably, and, in the opinion of this Court, *should not*, have varied the result, had it been before the Jury. *Roberts vs. The State*, 3rd Ga. R., 322; *Monroe vs. The State*, 5th Ga. R., 85; *Giles vs. The State*, 6th Ga. R., 276; *Beard et. al. vs. Simmon*, 9th Ga. R., 4; *Berry vs The State*, 10th Ga. R., 511; *Carr vs. The State*, 14th Ga. R., 358. The prevalent practice of carrying deadly

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weapons concealed about, the person; the greater readiness to engage in fight, produced by their presence; the frequent effusion of blood upon trivial provocations, and the frightful loss of life among us in this day, call for a stern enforcement of the Criminal Law.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

ROBERTS vs. GREEN.

If the officer arresting a defendant in *ca. sa.* take bond for his appearance at the Court to which the *ca. sa.* is returnable, on a certain day, which is not the day appointed for the sitting of the Court, and the defendant appear on the day designated in the bond, but after the time appointed for the holding of the Court and after its adjournment, the security is not responsible. It is the mistake of the arresting officer.

Certiorari, in Whitfield Superior Court. Decided by Judge WALKER, at the May Term, 1860.

This case came up and was heard, upon the following state of facts, to-wit:

Henry McCard was arrested by virtue of a *capias ad satisfaciendum*, issued from a Justice's Court of Whitfield county, in favor of Isaac W. Roberts against said McCard. On the 8th day of June, 1857, McCard gave bond, with John F. Green as his security, conditioned for the appearance of McCard "at the next Inferior Court to be holden in and for Whitfield county on the second Monday in July next, then and there to stand to, and abide by such proceedings as may be had by said Court, in relation to his taking the benefit of the Act for the relief of honest debtors."

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The time fixed by Law for holding the Inferior Court of Whitfield county was on the first Monday in July, at which time the Court was actually held, and during the Term, the *ca. sa.* of Roberts against McCard was called, and the defendant not appearing, and having filed no schedule, nor made any motion to take the insolvent oath, a judgment was rendered on his bond against him, and the said Green as his security, for the amount of said *ca. sa.*

On the second Monday in July, the time specified in his bond, McCard appeared at the Court-house, the usual and established place of holding said Court, and was informed by the Clerk of said Court that he was too late, and that the Court was over, having met on the Monday previous.

A *fi fa* issued from the said judgment rendered against McCard and Green, which was levied on the property of Green on the 27th of February, 1858.

At the July Term, 1858, of said Inferior Court, Green, the security, made a motion to set aside the judgment and *fi fa* on the grounds—

1st. Because there was no bond in Court upon which said judgment could be legally signed up.

2d. Because the bond on which said judgment was signed up, was returnable to Whitfield Inferior Court, to be held on the 2d Monday in July, 1857, at which time no Court was, or could be held according to Law, as the Law fixed the 1st Monday in July as the time of holding said Court.

Upon hearing this motion, the Court sustained the same, and set aside said judgment and *fi fa*.

Exceptions were taken to this decision, and the case was carried to the Superior Court of Whitfield county by Certiorari, and on the facts before stated, the presiding Judge dismissed the Certiorari, and affirmed the Judgment of the Inferior Court, and this decision of the Superior Court constitutes the error complained of in this case.

JOHN M. JACKSON, for the plaintiff in error.

DABNEY, by J. M. CALHOUN, for the defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

The case under review is this: The plaintiff in error having

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a judgment against McCard, sued out a *ca. sa.*, and caused McCard to be arrested. McCard offered to give bond to appear at the Court, whence the *ca. sa.* issued, and take the benefit of the Act for the relief of insolvent debtors, and tendered the defendant in error as security. The Sheriff having him in custody, prepared the bond which was executed, and the defendant in *ca. sa.* discharged.

The condition of the bond was, that the defendant, McCard, should appear at the next Inferior Court for Whitfield county, "on the second Monday in July next," &c. The time appointed for the holding of the Court, by Law, was the 1st Monday in the same month, and it was then actually holden. McCard not appearing, judgment was taken against him, and the defendant in error. McCard did appear at the place where the Court is holden by Law, on the second Monday in July, and exhibited himself to the Clerk. Is the judgment taken against the security, the defendant in error, valid? He did what he undertook in his bond to do—he caused his principal, who was legally in his custody, to appear at the place and at the time specified, and to present himself to a ministerial officer of the Court, to which the bond was returnable. He is a surety, and is regarded indulgently by the Law.

It is said that he was bound to know the Law—bound to know the time appointed by Law for the holding of the Court. This would have been a sufficient answer, had no time been stated in the bond. It is the duty of the arresting officer to take the bond. The defendant under arrest must satisfy him to procure a discharge from imprisonment. The bond was executed as prepared by the Sheriff. The mistake was his. Shall he or the security suffer the consequences of the mistake? We hold with the Court below, whose Judgment we review, and the Court of original jurisdiction, that the recourse of the party injured is not against the security.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

CHOICE vs. THE STATE OF GEORGIA.

1. C. is indicted for murder. The plea of insanity is interposed: *Held*, That it is not competent to prove, by a subsequent conversation with the prisoner, that he was insane at the time the homicide was committed. Neither is it allowable to give in evidence the tests that were applied during that interview in order to test prisoner's sanity at the time the act was done.
2. The State having proved the homicide, from which the Law infers malice-closed. The defendant pleads insanity, and supports his plea by proof. The State may, by leave of the Court, then offer evidence of express malice.
3. Witnesses other than experts may give their opinions as to sanity or insanity, provided they be accompanied by the facts upon which they were founded. Nor is it wrong for witnesses to state that the prisoner "appeared to be drinking."
4. The Court is not obliged to have the testimony taken down at the trial, read over to medical witnesses to enable them to express an opinion relative to the sanity or insanity of the accused. The proper course is, to ask their opinion upon the facts, hypothetically stated.
5. It is not error in the Court to express its opinion as to the grade of the offence made by the case, provided it is not done in the way of *direction*; and the omission or refusal of the Court to charge the Jury upon a grade of homicide not authorized by the pleadings and proof, is not error.
6. Family and neighborhood reputation is not admissible to prove that the prisoner was permanently injured in his mind, by reason of an injury which he had received.
7. If the condition of a man's mind, when unexcited by liquor, is capable of distinguishing between right and wrong, reasoning and acting rationally, and he voluntarily deprives himself of reason by intoxication, and commits an offence while in that condition, he is criminally responsible for it.
8. "Nor does it make any difference that a man, either by former injury to the head or brain, or constitutional infirmity, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts while in that condition. But if a man be insane when sober, the fact that he increased the insanity by the super-added excitement of liquor, makes no difference. An insane man is irresponsible, whether drunk or sober."
9. The disease called *oinomania* questioned.
10. An inordinate thirst for liquor, produced by the habit of drinking, is no excuse, legally or morally, for the consequences resulting from the indulgence of such appetite.
11. Moral insanity, or irresponsibility for crime, from an inability to control the will, from the habit of indulgence, controverted.
12. This doctrine has no foundation in the Law, and the consciousness and conscience of mankind has in all ages been opposed to it.
13. "If a man has capacity and reason sufficient to enable him to distinguish

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between right and wrong, as to the particular act in question; if he has knowledge and consciousness that the act he is doing is wrong, and would deserve punishment, he is, in the eye of the Law, of sound mind and memory," and the subject of punishment.

14. The opinions of experts is competent testimony; and when the experience, honesty and impartiality of the witnesses are undoubted, their testimony is entitled to great weight and consideration. Not that it is so authoritative that the Jury are bound to be governed by it. It is intended to aid them in coming to a correct conclusion in the case.
15. Where the verdict is fully sustained by the testimony, and the Law of the case has been correctly administered, this Court will not disturb the finding and judgment, especially in a criminal case.

Indictment for Murder, in Fulton Superior Court. Tried before Judge BULL, at the October Term, 1859.

At the April Term, 1859, of the Superior Court of Fulton county, a Bill of Indictment was found and filed, charging William A. Choice with the murder of Calvin Webb.

On the trial of said indictment, at the October Term, 1859, the following testimony was introduced and submitted to the Jury, to-wit:

Evidence on part of the State.

JOHN CASON sworn, says: The deceased was killed on the 31st of December last; witness and Mr. Webb were walking together: deceased said, don't shoot; witness turned and saw prisoner in the act of shooting, and did shoot very quickly; did not appear like he was going to shoot immediately again, and did not; deceased turned to witness and said, I am a dead man; thinks it was on 31st December last; it was in the County of Fulton; the shooting took place near the Trout House, in the city of Atlanta. After witness and deceased passed, prisoner came on after them and stood on the ground witness and deceased had passed over; witness and deceased were about forty feet from the corner of the Public Square, next the Trout House, where the shooting took place; it was a rainy day. When witness first saw prisoner, he was standing near the corner of the Public Square, next the Trout House. The reason why witness turned around as he and the deceased were walking on from prisoner, was, that the deceased said, "don't shoot;" two shots fired. There was nothing said by the parties only what I have stated. Deceased, when shot, turned and walked back toward Davis'

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store, and went only about five or six steps. Witness went to the deceased when he fell; made no examination as to where he was hit; called to others to come, that he was a dead man; does not think deceased breathed after he fell; did not see him move hand or foot. Witness saw the pistol discharged; does not know what kind of a pistol it was; had one barrel, but shot twice. The wound was in the right part of the breast, near the right shoulder; thinks it was in the right shoulder, but not positive; does not think deceased lived more than one minute after the firing of the pistol. At the time of the shooting, deceased was walking nearest to the fence around the Park, or Public Square. This was in December, 1858.

Cross-examination: Did not see Mr. Choice at all until after deceased spoke; had passed the corner, but did not see prisoner when they passed; was not walking very fast. Witness and deceased were crossing from the Trout House when witness first saw prisoner; he was on the plank walk; does not know anything Mr. Choice said before Mr. Webb said, don't shoot; thinks Mr. Choice had a hat on—not positive; did not see Mr. Choice until he got to the corner; does not know how he got there; did not hear Mr. Choice say anything. Deceased was carrying an umbrella over witness; they were walking elbow to elbow, but not locked arms. Mr. Choice stood pretty firm; did not see him reeling; looked at prisoner only one or two minutes; saw him fire the pistol. Choice was a stranger to witness. It took place at about as public a place as any in the city of Atlanta; public open place all around; about 20 or 30 steps from where prisoner was standing to the Trout House; about the same distance to the Atlanta Hotel; did not know to whom deceased spoke, when he said, don't shoot; deceased had to look back to see prisoner; saw no other persons in the street at the time, only Choice and deceased. Witness and deceased were passing on toward the *Shed*; prisoner had no umbrella over him; heard no sound from him; did not even hear his voice.

Re-examined by the State: When witness turned at the time of shooting, he turned to the right; at this time prisoner had the pistol aimed, and fired very quick.

DR. J. F. ALEXANDER, sworn, says: Saw deceased after he was killed; examined the wound upon him; there was only one wound—that of a ball fired from a gun, or pistol, or

something; it took effect in the right breast, just about the shoulder; entered the cavity of the chest: thinks the severing of the large arteries by the entering of the ball caused deceased's death. The examination was made on the same day of the killing; this was in December, 1858: the wound was mortal; thinks, from the wound, death would take place in a few seconds; there was no other wound upon deceased. This occurred in Fulton county.

Cross-examined: First saw deceased on that day about 10 o'clock; it was raining. There is a disease called Monomania, or Dipsomania, caused by using intoxicating drinks; looks on Mania as always the same; but, the exciting cause be what it may, would draw a difference in an act caused by Mania, produced by intoxicating drinks, and by drunkenness. A blow upon the head, so as to fracture the brain or produce a severe concussion, may produce "elision" in the brain, so as to act as a predisposing cause to insanity: an attack of insanity always presupposes a recurrence again: every attack increases the severity of them. Insanity, during a relapse, is as when first brought on, and reason is as much destroyed. When this madness and raving is produced by the use of liquor, the liquor is merely an exciting cause. An attack produced by the exciting cause produces unconsciousness, the same as the attack produced first by the blow or concussion. This disease of the brain is liable to relapse by causes over which the patient has no control. An act done in a relapse state is the act and deed of an insane man, and not of a drunken man. Frequently an increased severity of the attack. Elision is caused by concussion, or any violent blow.

An act committed during relapse, if insanity, through liquor, was the exciting cause, it was the act of an insane man, and not of a drunken man. A man in this state of insanity, though produced by liquor, is unconscious of right and wrong. Stupor is apt to follow an act of excitement, and when aroused from that state, is unconscious of what has taken place. When he has fallen into stupor from one of these attacks, and aroused, is apt to be unconscious of what occurred; when he has been aroused from this stupor, and is unconscious of what has occurred, it is evident that he has had an attack of insanity; when it is known that he is subject to such attacks, any moral depressing cause will be likely to

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bring on a relapse of insanity, such as disappointment in business, &c.

Re examined by the State: Oinomania is different from Mania-a-potu: the latter is caused by strong drink alone. When thus produced, he is unconscious of what he does; and if a man is conscious of what he says, it is evident that he is not laboring under Oinomania or insanity. A man laboring under Monomania cannot connect events, &c. It is only when the sense of danger is the cause of insanity, that the patient has the dread of danger. When a patient gives evidence of a sense of danger, it is an evidence that he is not in a state of Mania. A person insane is unconscious of danger; and showing a sense of danger, is evidence that he is not insane. The principal symptoms are a total loss of mind. There is no species of insanity in which a man can talk, and think, and act coherently, except in Monomania. If a man talks, acts and thinks coherently, that is the highest evidence that he is not insane. A man afflicted with Monomania cannot recollect and narrate things and acts coherently. If a man can do this, it would be one of the highest evidences that he was not insane; might remember facts, but could not recollect and narrate them in the order in which they occurred; could not reason upon them, and could not be reasoned with, so that his conduct could be controlled by argument of others. There are always physical appearances of insanity: the eye is the greatest index. A man who is accustomed to it, can tell when a man is afflicted with insanity. Where you find any one under the influence of drink, is raging and raving, he is predisposed to insanity, and might be brought on; liquor is the proximate cause, and the constitutional or accidental predisposition is the remote cause. Extreme drunkenness causes deep stupor. If, on awakening, the person shows a recollection of what took place before the stupor, this would be an evidence that it was not insanity; when recovering from stupor, a person is as oblivious as from insanity. However drunk a man may be, he will understand something you may say to him; but if insane, he will not. One of the symptoms of Dipsomania is thirst for drink—an irresistible thirst for drink. If the causes which rendered the person insane were those of danger, it would be almost certain for the patient to be sensible of danger in cases of relapse. Much that witness has said in reply to Solicitor General, has been in

reference to Mania generally. When witness, in reply to Solicitor General, said that an insane person could not reason, he did not mean to say that he could not have ideas. Insane persons generally exhibit a good deal of cunning and shrewdness. Insanity, in its types and symptoms, differ as subjects differ; cannot lay down general symptoms. The fact that a person exhibits, or seems to exhibit, shrewdness, does not rebut the idea that he is insane, and irresponsible. Insane persons commonly sing songs, speak speeches, and then, when told of it, be perfectly unconscious. The songs and speeches, they have learned when sane. Insane persons frequently exhibit a physical power when they have no moral power; insane persons know that fire will burn a house, a pistol will shoot, but not sensible of the criminality and moral wrong, and will show a disposition to use them. A person acting under the influence of Mania, as described by the witness, his acts will apparently be the result of consciousness, and a distinction between right and wrong, when the fact of being so is entirely the reverse. A man cannot be drunk, unless from the effects of liquor; and if from drugs, it is insanity. Persons afflicted by excessive use of intoxicating drinks, give evidence of fear and apprehension.

JAMES R. JACK sworn, says: The killing took place on the 31st December, 1858, between 10 and 11 o'clock. Witness' attention was first attracted by the fire of a pistol; witness was in the store of J. C. Davis; witness looked down; saw Mr. Choice down there; saw Mr. Cason to the right of Mr. Choice, and at the same time saw Mr. Webb walking off from Mr. Choice. Witness looked down to the Trout House to see who he was shooting at; saw Mr. Choice with his pistol presented at deceased; saw deceased step some two or three steps after first fire; stepped off the plank walk and looked back at Mr. Choice; stepped two or three steps on toward the Atlanta Hotel. When deceased had stepped one or two steps, he looked back, and Mr. Choice fired the second time at him, and hit him somewhere about the right shoulder; when prisoner fired, and ball struck deceased, it staggered him, and deceased turned around facing the store, made one or two steps, and said, I am a dead man; he commenced getting weak in his right leg, and fell on his face inside his umbrella; prisoner still stood there with his pistol, and moved it around as deceased walked. After deceased fell, prisoner

dropped his arm he had his pistol in, and, as he stepped off, hung his head and put his hand up to his face. Some one came running down the street, went toward prisoner, when prisoner stopped, and moved his pistol around for him to come on. After the man stopped, prisoner went on, stopped on the side-walk, and Maj. Nickerson said something to him; he waived his pistol at him, and went on down the street on the side-walk; walked on down the street some thirty or forty yards, and turned out into an alley below where Masonic Hall is now being erected; the alley is some twenty or thirty yards from the Trout House; the alley is some twenty or thirty yards from the Trout House; turned up the alley; it is a private place. The first witness saw of prisoner on the morning of the difficulty, he was coming down the steps at Mr. Ennis' bar-room; did not see deceased and Mr. Cason; it was between the firing of the pistols about as long as a man could walk ten or twelve steps; deceased was going from prisoner when the second fire was made; witness was about seventy feet from prisoner at the second firing; the second fire was a deliberate aim; seemed to be very particular to take aim.

Cross-examined: When he speaks of coming down steps, he means steps on side-walk; when he first saw him he was going down Decatur street, and when he fired, he continued to walk crosswise down same street; did not hear anything prisoner said; he did not seem to be saying anything; just carried his pistol along in his hand; did not try to hide it at all; walked as firmly as he ever saw him; had no umbrella over him; carried his pistol along in regular sort of way; had on common cloth coat, (dark.) Last witness saw of him until arrested, was at alley; walked through the mud across the street; saw the crowd—the mob; it was a very large crowd; made great noise; the crowd was around the fence about fifteen feet from the Calaboose; they were around there some hour or so; thinks at the time of the shooting, that it had quit raining; when prisoner fired he was quarter across the street, and got on the side-walk, nearly opposite the ladies' entrance in the Trout House; when he got on the side-walk, prisoner walked fast; heard some of those who were around the Calaboose hallooing, hang him! hang him!

THOMAS GANNON sworn, says: The killing took place in the county of Fulton, 31st day of December, 1858. Saw

prisoner coming from Atlanta Hotel to Trout House; came within seven or eight steps of Mr. Webb; took his pistol from his coat pocket and elevated it and shot deceased right over his right shoulder; second shot that he fired was about three-fourths of a moment; at the same time, deceased stepped off the walk towards the Atlanta Hotel; thinks second shot took effect; deceased went off about twelve or fifteen steps and fell to the ground; Mr. Choice came from where he stood at the time he shot him, and passed by the Trout House to the next dwelling-house; turned from there across to the other street through the back lot. Deceased and Cason were walking towards the Passenger Depot; prisoner was coming from the Atlanta Hotel bar-room, and came up within about thirteen steps from the walk that leads from the Trout House to the Passenger Depot; when he fired first, deceased and Mr. Cason were coming up from the City Hotel, and turned at the Trout House to the Passenger Depot; saw prisoner come out of the bar-room of Ennis' a short time before the difficulty. Witness was standing at the door of the Trout House, about twenty-five or thirty steps off.

Cross-examination: When he first fired he was about thirteen steps from him, and walked six or seven before the second fire, further off; Mr. Choice did not walk any nearer to Mr. Webb, but continued in the same direction; Mr. Choice had a wild, excited look; seemed really very much excited; prisoner crossed the street, after he fired, to the side-walk on the other side; there is no side-walk on the side of Decatur street where he was at the time of the firing.

F. B. BOGGUS sworn, says: He was passing down Decatur street opposite the Athenaeum; heard a pistol fire; looked in the direction, and saw Mr. Choice in the smoke; saw Mr. Webb looking back over his shoulder; deceased kept on the crossing in company with another gentleman; saw prisoner put his pistol down on his leg like he was cocking it, and again raised it up and fired; saw deceased throw his hand up behind; deceased turned round and walked toward witness, and said he was a dead man; walked some seven or eight steps and fell. Prisoner then turned and walked across Decatur street toward the lower end of the Trout House; a gentleman came running down the street; saw prisoner turn with his pistol in his hand; witness jumped into the house of Davis; thought he might shoot again. When witness came

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out of the store, saw prisoner going down the side-walk; saw him turn from the side-walk; deceased was going from prisoner; never heard but one word spoke—that was by deceased, that he was a dead man; at the time the man came running down the street, Mr. Choice brought his pistol around in the direction of him, and he stopped.

State here closed for the present.

H. H. BLAKE sworn, says: He lives in Floyd county, Georgia; was in Rome latter part of December; was there about Christmas; saw prisoner there during that time; prisoner appeared in a condition, from the looks of his eyes, that he was not right; had a wild and dangerous look; looked wild out of his eyes; did not want to have anything to say to him; had the appearance of a wild, crazy man. About Christmas times he did not look like he did formerly; thinks he must have known what he was doing, but still, he did not look right out of his eyes; was not acquainted with prisoner. It was a few days after the killing before witness heard of it; it was the latter part of December, 1858; had seen prisoner frequently, but was not intimately acquainted with him.

Cross-examined: Was not with prisoner much about the time he testifies; don't think he ever spoke to prisoner, only perhaps to say howdy; witness saw prisoner frequently about the Choice House, and in the streets at Rome.

DANIEL S. PRINTUP, sworn, says: He is acquainted with prisoner; has been acquainted with him for about eleven years; thinks in the latter part of 1850; he heard of a horse running away with him in a buggy; thinks it was in the fall of 1850. Witness, when he heard of it, immediately went out to where the accident happened; when witness arrived there, they had carried him (prisoner) to the house of Mr. Mitchell, near where he got loose from the buggy. When witness went into the room, prisoner was lying on a pallet, very seriously injured about the head; the injuries seemed to be produced, as witness concluded from appearances, from being dragged along; the blows were *contusion and concussion*; the place where the horse ran away was descending some two hundred and fifty or three hundred yards; the ground was uneven; there were signs of the dragging on the ground. When witness first saw him lying on the pallet in the house, he (prisoner) was very much mangled, and bloody, and did not seem to know what was going on about him; prisoner re-

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mained in that state of unconsciousness for some four or five weeks, witness thinks, and when he seemed to recover from it, he did not seem to recover the faculties of his mind to the same extent he had before; prisoner's life was despaired of for some time—did not think he would live; during the whole time of his danger, he did not seem to have his proper mind—raved, and was delirious; since that time, when he (prisoner) has been excited from drinking, or any other exciting cause, he did not seem to be in the exercise of a sane mind—seemed to throw him back. Prisoner's mother, about the time of the homicide, was very low, and at the point of death. When she was first taken, prisoner took charge of her business to a considerable extent; thinks before the difficulty occurred, prisoner left Rome some two or three days; is not positive as to number of days; before he left Rome he had been drinking; did not see him drink, but saw him as he was recovering; seemed, when he left, to be somewhat out of his mind—in rather a wild condition, and tried to prevail on him to remain at home; could not reason with him so as to induce him to remain at home; he did not act as he formerly did; his mother entreated him (prisoner) not to leave home because of his condition; he (prisoner) was sober at the time he had charge of his mother's business; witness considered prisoner in a dangerous condition at the time, to leave home; prisoner had been in the habit of carrying a pistol, (a repeater;) the family had endeavored to prevent his carrying it. Just before he left Rome, and before the homicide, he (prisoner) tried to get a pistol, but no one would let him have one, owing to the condition he was in; when in the condition alluded to, he would injure a friend as soon as a foe; prisoner threatened on one occasion to kill witness without any reason whatever.

Cross-examined: When prisoner threatened to kill witness, it was three or four years ago; he had been drinking at the time. When under the influence of liquor, he is a very violent man; when in the first stages, he is not violent, but is in the latter; when he is in this violent stage of drinking, he is a very dangerous man to be about, to either friend or foe. Witness has known of his loss of mind some four or five times since 1850; the exciting cause is generally liquor. There was one time, the witness thinks, when it was from another cause; he was gloomy and moody; did not drink,

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but seemed to avoid society. On the other occasions, the exciting cause was liquor; cannot say it was at that time; he thinks it was from some other cause; the prisoner had not been drinking; it was after Christmas, when prisoner left Rome; thinks it was two or three days, or more; not less than two days before. Witness conversed with prisoner, four or five years ago, about the injurious effects of drinking liquor, and he seemed to have a desire to abandon it. Prisoner's mother was very low at the time he was in this gloomy condition in October or November, before the killing; prisoner was one of the clerks in the Senate the latter part of the session, last Legislature. At the time he speaks of prisoner's being gloomy, he is satisfied, from his manner and general appearance, that he had not been drinking; at the time he (witness) speaks of prisoner being gloomy, he did not act as he usually did; witness' inducement to think he was out of the way was, that he seemed depressed, and did not mingle in society; when prisoner conversed with any one, it was rational, with the exception of one time, which was about some money; prisoner objected to his mother depositing money in the Bank for safe-keeping, and his conduct was irrational; witness knew no reason why it should not be deposited; cannot say whether or not prisoner knew at the time the difference between right and wrong; does not think at the time referred to about depositing money, he was in his true state of mind; might state at another time there was a writing drawn, and prisoner did not seem to understand the reason of the writing—the connection; prisoner became furious about his mother depositing his money in the Bank.

JOHN M. GREGORY, sworn, says: He is acquainted with prisoner at the bar; is a practicing physician; saw prisoner at the time of his injury, in 1850. When witness got to him, (it was a mile from Rome,) he, prisoner, had been taken into a house, some one hundred yards from where he fell. Found him very much bruised and dirty; his clothes were torn bad; had the appearance of having been dragged some distance. After washing the brow, found one wound just across the forehead, a deep wound; several others, smaller, on his head. He was generally bruised. He, prisoner, was not rational at the time witness saw him first; he was not rational for about two months, with slight exceptions. From examination made, thinks there was compression of the

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brain; that the inner temple of the brain had been broken; and was apprehensive that he might have concussion of the brain. Prisoner was treated for concussion of the brain. Dr. Douglass and Dr. Coleman, and also Dr. H. V. M. Miller, were in the treatment of the case with witness. Dr. Hamilton also knew about it—he is dead. The reason why Dr. H. V. M. Miller is not here is owing to Providential interference; Dr. Douglass lives in Dougherty county; Dr. Coleman is in Texas. Witness and Miller are the only ones who now live in Rome, Georgia. Has been acquainted with prisoner since this injury; has been in the house with him frequently; has acted very much like a mad man, when excited by liquor or other causes. Knew prisoner before he received wounds on the head; do not think he fully recovered his mind; he has been a changed man since. Has seen him perfectly insane, when under the influence of liquor, and acting unreasonably when not drinking. When he recovered from these periods of insanity, he seemed to have no recollection of what occurred. From witness' knowledge of the disease of prisoner, from effects on the head, when drinking, he is both drunk and insane. Knows of Mr. Choice taking charge of his mother's business about four months before the killing. Prisoner acted strangely then, particularly as his mother was in the condition she was. Saw prisoner a short time before the killing, and before he left Rome for Atlanta; had been drinking several days; does not know that he was drinking; was acting like a man who had been drinking; also acted like an insane man. Witness states that, if prisoner was, on the morning of the killing, shooting at a servant about the hotel, and waving his pistol about, telling a friend to prepare to die, he would say that no sane man could act so; and after the homicide, went to sleep in the calaboose, and slept soundly, while the mob were clamoring for his life. From these facts, coupled with witness' own knowledge of the prisoner, he (witness) would say, as a physician, he was an insane man. From witness' knowledge of Mr. Choice's condition at the time he left Rome, if he came to Atlanta in the same condition and shot down a man publicly in the streets, and after being carried to the calaboose, went to sleep, while a mob was clamoring for his life, he would say no sane man could act so. Witness says, as a physician, he thinks that when prisoner left Rome to come to Atlanta, he

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was an insane man. Thinks he had no pistol when he left Rome; and his reason for thinking so is, that he asked witness for one the night before, and witness refused to let him have it. There was a difference in Mr. Choice and other men, when he was drinking.

Cross-examined: Thinks prisoner left Rome on the 28th or 29th of December, 1858. Is a brother-in-law of Mr. Choice, and tolerable well acquainted with Mr. Choice's habits. Thought, at the time he left Rome, the exciting cause of prisoner's insanity was liquor. Thinks liquor was the exciting cause of insanity, when produced by liquor. Mr. Choice is a very violent man, when drinking.

Re-examined by defense: When a patient is afflicted with Depsomania, he has a thirst for drink which is almost irresistible. When prisoner is in the first stages of drinking he is companionable; when in the latter stages, becomes more violent. Prisoner's conduct was not rational at the time he was waiting on his mother, and when he was not drinking. He (prisoner) would sit by his mother, and shed tears, and next moment would not act consistently. Thinks prisoner's mind would be more easily affected than other persons', by having received wounds on the head. If prisoner was predisposed to insanity, from injuries on the head, he thinks that liquor was the exciting and immediate cause. Oinomania is a thirst for drink, after the use of it; Oinomania is a class of Monomania—thinks, but not positive, not having examined the subject recently—is inclined to think that prisoner was afflicted with Oinomania; is most positive of it. Thinks that a person afflicted with Oinomania is insane upon one subject, but sane upon other subjects, according to his recollection of the authorities on this subject.

S. B. LOVE sworn, says: He saw Mr. Choice on the evening of the same day of killing, in calaboose; he was lying down, and did not get up while witness was there; found him lying down, and left him lying down. Don't know what he was lying on; was lying still like asleep, after the crowd dispersed; first, witness went in after this crowd; came back again, the crowd was assembled at the calaboose; when witness got there, after he dispersed the crowd, went in and found prisoner in the condition described.

Cross-examined: Did not stay in the calaboose only a minute or two; did not see any chairs, or anything to sit on

in calaboose. The crowd was rather quiet when witness went in.

Dr. B. F. BOMAR sworn, says: He had conversation with prisoner the day previous to the homicide; was going home from his office, saw prisoner near the Athenaeum. Prisoner came out to witness as he was passing and said his mother was laboring under some paralytic affection, and he thought it would be mortal; that she would not recover. Prisoner looked very much dejected, so much so that he (witness) remarked it to his wife when he went home.

Cross examined: Prisoner seemed to be very sane, spoke rationally, saw nothing to make him think prisoner was insane, only his manner, and seemed dejected; did not talk like a man that was out of his mind; but there was a peculiar expression about his face, an indescribable expression between dejection and despair; did not know at that time of the peculiar design of prisoner's brain. When a man speaks rationally, and acts rationally, he would not consider the expression an evidence of insanity alone.

JOHN W. HOOPER sworn, says: Was acquainted with prisoner prior to the injuries he received upon his head, in 1850; he was considered a smart boy, above ordinary capacity; saw him soon after the hurt; saw wounds; witness' conclusion was, that it was uncertain whether or not he, prisoner, ever recovered his mind. Witness inquired of prisoner how the matter occurred, and prisoner could not tell him; that he had no recollection of any of the events of the injury; could not recollect getting in the buggy or anything connected with it. Considerable time after the occurrence, probably about twelve months, when this conversation took place between prisoner and witness.

Cross examined: Has frequently seen prisoner since the hurt; has considered him a man of intelligence, more than ordinary; it was eight or nine years ago, when witness thought it uncertain as to whether or not prisoner recovered his mind.

H. A. GARTRELL sworn, says: Was acquainted with prisoner before the wound received, in 1850. Has roomed and boarded in the house with his mother, and went to school with him; before hurt, he was a smart, promising young man, witness always thought. Thinks it was about 1851 or 1852, prisoner spoke to witness about going into some business, but said he did not have the money; witness asked him

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where the money was he got from his grand-father, which was about \$3,000; said he had made way with it, but did not know what he had done with it; said he presumed that he had lost it gambling; said he did not know; said he made way with it while his mind was affected from a hurt he received on his head; and remarked at the same time, his mother or some of his friends ought to have taken the money away from him, knowing his condition. Witness' opinion is, that his (prisoner's) mind has been affected, more or less, ever since he received the injury on his head; it is increased when under the influence of liquor. Prisoner used to be very sociable before the hurt, a pleasant man; since, morose, ill-natured; has seen him (prisoner,) last summer, promenading his mother's piazza, hours at a time, solitary and alone; the most gloomy and mysterious looking man, I (witness) ever saw.

Cross-examined: Has not spoken to prisoner for five or six years until a few weeks past; boarded at his mother's hotel all the time; some little difficulty occurred between witness and prisoner which caused witness not to have anything to do with him. It was a trifling, frivolous matter they fell out about; prisoner was very exacting and insulting, and he did not wish to cultivate feelings of intimacy with him. At the time of the difficulty he did not think prisoner insane, but thinks that his mind was more or less affected all the time; this affection of the mind had more influence upon his disposition than upon his intellect. Has never seen him, only when he was under the influence of liquor, insane.

W. W. SPALDING sworn, says: Has had charge of an institution where he had insane persons frequently under his charge, in Hartford, Connecticut, and was book-keeper and disciplinarian, four years and four months, in the house of correction. Saw prisoner the day of the homicide and the day before; saw the officers have him arrested, and noticed him particularly. His eyes were very glassy and seemed very strange, so much so that he called the attention of several to it. He (prisoner) came by the hotel; they were bringing him down Pryor street; the crowd was very much excited; he watched the expression of prisoner's countenance, to see if any change came over it; he saw none; it was so evident that witness called the attention of several gentlemen to it. Witness' impression was, that the prisoner

was crazy; at the time of his eyes looking so glassy, his head was thrown back.

Cross-examined: Says there was a great deal of excitement, a large crowd, some of them crying out: "Hang him! hang him!" Prisoner took breakfast with witness in the restaurant in the Trout House the day of the killing, about half-past ten o'clock. Prisoner came to witness night before to borrow a knife; said he was going out of town; did not see much of prisoner night before; did not see him drink anything I recollect of; Mr. Thomas or John Gannon were keeping the bar-room at the Trout House; the time witness saw prisoner in the custody of the officers was about half an hour after the killing.

JOSEPH THOMPSON sworn, says: He keeps the Atlanta Hotel; saw prisoner there the day of the homicide; heard two reports of a pistol at the hotel, went to see what was the matter; saw prisoner coming down stairs with a pistol in his hand; witness told prisoner he had better go to his room, that he would shoot some one at random; saw some shots in the room in the hotel; prisoner, when witness met him, said he had been shooting at some damned woman; after this, was mixing up some medicine and heard the report of the pistol that did the deed; it was not twenty minutes after. Was formerly practicing physician. It is very doubtful whether he knew what he was about; don't think he would have conducted himself as he did if he had. It was not more than twenty minutes after witness spoke to prisoner, he heard the shots that done the deed. Prisoner seemed to be wandering about the house and yard that morning.

Cross-examined: Don't think he saw prisoner drink any that morning; seemed to be on the order of a maniac; witness don't know from what cause; did not see anything of the difficulty the night before; has seen men in a high state of excitement, acting like a maniac; has known of a case or two where young men were equally as desperate from drinking; prisoner was wandering about the house and yard that morning; did not seem to know in what part of the house he was; the shooting was some sixty feet from his (prisoner's) room; prisoner did not seem to stagger when witness told prisoner to go to his room, that he would shoot some one; said to witness he would not shoot him; it was about 9 or 10 o'clock, when this all occurred, in the morning;

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left prisoner and son, G. H. Thompson, standing on the steps of the Atlanta Hotel, near John Ennis' bar-room. Prisoner has boarded with witness about one year, in all; never has seen anything to warrant him in thinking prisoner was insane; has known persons who had had concussion of the brain which produced convulsions; afterwards relapses affect them in the same way, sometimes in a comatose state.

THOMAS J. ECHOLS sworn, says: Saw Mr. Choice on the morning of the killing; saw prisoner present his pistol at two or three; presented it at witness twice, and said to witness he had to die; witness talked a little rough to prisoner, and made him put the pistol up; witness and prisoner have always been friendly; he seemed, from the way he done, he did not know his friends from his foes, and did not care; said to witness you may prepare to die, I am going to shoot your head off; the pistol was capped, cocked and he had his finger on the trigger; witness caught the pistol and put it up.

Cross examined: Occurred at the bar-room of the Atlanta Hotel—Ennis' bar-room; prisoner appeared to be drunk; witness supposed him drunk, or he would not have done it. Did not know of any affection of his (prisoner's) head, and did not see him drinking; his appearance was about the same as when he had seen him before, when he had been drinking.

M. N. BARTLETT sworn, says: Prisoner was always the most sensitive man he ever saw, he thinks; was at a party on an occasion, and witness, prisoner and another young man went home with some ladies, and on their return home, the young man was teasing Choice about talking to the young lady all the time about the weather; it affected prisoner to tears, and prisoner said to him that he did not think he ought to treat him that way as a friend. It was a long time before they could get Choice reconciled. Choice was sober at this time.

Cross examined: Has known Choice very intimately for several years, and considers him a man of promise and talents, but subject to eccentricities; never has seen him, when he considered him insane. Witness considers him, when drinking, the most dangerous man he ever saw, both to friends and foes; he looks much like a lunatic, when drinking; he scarcely ever staggers; remembers to have gone to

his room on one occasion, when it was said, he (prisoner) had got into a scrape, found him lying down on the bed; prisoner asked witness what he had been doing; did seem like a drunken man; for a long time, afterwards, observed signs of drunkenness; prisoner, after one of these spreeds, would swear he would quit drinking, and witness thought he would; he would quit for a month at a time; when he was under the influence of liquor, he was very likely to take offence; was very peaceable when sober.

Re-examined: Did not know anything about Choice being injured on the head; he (prisoner) always seemed sorry after one of these spreeds; has seen prisoner, when drunk, when he was perfectly wreckless and a maniac; when witness called upon prisoner in his room, prisoner had no recollection of what he had done; the crying spoken of, was about three years ago. When they went from Atlanta Hotel towards the theatre, he seemed to be sober, but when they got in the theatre, prisoner commenced hallooing "boots" which caused witness to think he was drunk. Has heard prisoner say that he frequently got into these melancholy moods, when he avoided friend and foe.

H. W. BROWN sworn, says: He heard Spalding's description of prisoner of the day of his arrest. If a man should be insane and relapse, and it was to resemble the original attack, he would pronounce him insane; symptoms of a relapse are similar to the original attack. What is Dipso-mania? Answers: it is a crazy desire for stimulants. How is it produced? Answers: 'tis congenital, accidental, or acquired by accidental injuries, and among others, such as has been mentioned by other witnesses; the authorities are, that, when afflicted in this way, the patient has no control over himself, or when driven to drink, and having indulged excessively, he is insane or a maniac; a maniac cannot be competent, and I would consider him as fully incompetent. Taking all the facts as true, which have been testified to be, would regard him in one of those paroxysms of recklessness of mania. Witness regards him, in such a paroxysm, as a maniac, and does not consider a maniac capable of very correct decisions.

Cross-examined: In Oinomania, witness thinks, a patient has the power to control his thirst, and has control of himself; witness thinks there is no such disease as Oinomania; this is

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his opinion against the weight of medical authority; and if a man is coherent in his thoughts and ideas, he would consider him a sane man; if they think and act coherently, it is the highest evidence of sanity, taken apart from his other acts on evidences of sanity; if at the alleged moment of insanity the patient could narrate things coherently and give the relations of cause and effect, it is the highest evidence of sanity; a man may be sane at one moment, and the next crazy as a bed-bug; a patient may be lucid for a few moments at a time, and then relapse again; at the time insanity is alleged, if the patient can be reasoned with, and controlled by reason, then he is sane at that time. Witness does himself believe that a thirst for drink is not properly a mania, but mania may be produced by drink; sometimes the subjects of mania recollect, and sometimes not.

Re-examined: If a person affected, as in this case, is crazed by drink, he would call him a maniac at that time; if witness had reason before to believe a man a maniac, the circumstance of his escaping through an alley would not, in his opinion, disprove it, nor would his recollection of it afterwards be an evidence of sanity; sometimes maniacs manifest a great deal of cunning; alcoholic stimulants sometimes produce insanity as much as any other cause.

DR. WILLIS WESTMORELAND sworn, says: That he knew the prisoner at the Bar; has heard the testimony of the condition of the parties in this case, and taking the whole of the circumstances as declared to be true, it is witness' opinion that the prisoner was not rational at the time of the commission of the deed. In the winter of 1857 or '58, witness was in Trout House bar-room, with two or three gentlemen; during which, Choice came in and called for something to drink; the bar-keeper told him he would wait on him directly; prisoner then drew his pistol, presented it at the bar-keeper and bursted a cap, and immediately turned, and, without saying a word, presented it at another gentleman, and witness caught his arm and arrested him, and told him he was acting very imprudently; prisoner then stated that if witness said so, he would desist, as he believed witness was a gentleman; it was a man named McGee, as witness thinks, that he bursted the cap at, and thinks it was Mr. Lockhart at whom he presented the pistol.

Cross-examined: In some particular constitutions, liquor

may make as perfect maniacs as any other causes; thinks that prisoner was drunk at the time of the difficulty in the bar-room.

Re-examined: There are cases when, in an injury of the head or concussion of the brain, the least excitement will produce insanity, which generally subsides when the cause subsides; there are cases of monomaniacs, when they may be conscious of what they do, and that they will be punished, if detected, for it, who are yet irresistibly impelled to do it. In case of injury to the brain, when liquor produces insanity, the liquor is the exciting or prominent cause, and the injury the remote or predisposing cause.

DR. JOSEPH P. LOGAN sworn, says: That he heard the testimony of Dr. Gregory and Col. Printup read, in relation to the condition of the prisoner, and the testimony of Thompson, Gartrell, Spalding and Echols, and, taking all the facts to be true, he should consider the prisoner irrational at the time of shooting deceased. There is a difference between irrationality and insanity; in cases of insanity produced by lesion of the brain, and of relapses from exciting causes, the relapse would partake of the character of the original insanity.

Cross-examined: There are cases of certain constitutional condition when the excessive use of liquor will produce as genuine insanity as any other cause. When an individual has been in the long-continued use of alcoholic liquors, it will produce insanity, and thinks it may produce permanent injury to the brain, and a man may thus become as perfect an idiot as in any other way. All these facts may be as correctly explained by drunkenness as by any other cause of insanity. The excessive use of liquor may produce this glazing of the eye, and may produce very much the same appearance as insanity. Although the authority recognizes *Oinomania* as one specie of insanity, witness' individual opinion is, that a controlling thirst for liquor is not insanity, but the force of habit. Taking all the facts, witness does not pretend to say whether prisoner's irrationality was produced by the injury to the brain or by liquor. In a case when an individual is capable of reasoning from cause to effect, and shows a knowledge and recollection of facts in their connexion of cause and effect—can be reasoned with and influenced by argument—shows a sense of personal danger—exhibits

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coherency of thought and speech, and a knowledge of what has passed during his supposed insanity—witness would think these evidences of sanity, if those were the habitual states of his mind.

Re-examined: The fact that man obeys for a moment the voice of reason, and soon after forgets, and resumes his former conduct, that would be no evidence of sanity, if such were his habitual state. When, in addition to the organic change of the brain produced by liquor constantly used, there had been also a lesion of the brain by a hurt or otherwise, perfect insanity would be more likely to occur by using liquor. In this perfect state of insanity the subject can not distinguish between right and wrong any more than if he were insane from any other cause. The thirst for liquor, or *Dypsomania*, I do not consider *Mania*, but when it is yielded to in these supposed conditions of organic change in the brain, it may constitute insanity proper. The authorities represent the thirst for liquor as irresistible when there is *Oinomania*; do not know that the mere fact of the brain having been injured would be conclusive evidence of this irresistible thirst; if the subject presented different characteristics after the injury from what he did before, this would be evidence of permanent injury for lesion of the brain.

Rebuttal.

In the supposed case, the liquor is the exciting and immediate cause, the injury the predisposing cause, and both constitute the insanity. The organic changes and the injury both are the predisposing cause when the injury resulted in an organic change.

Defence closed.

The State re-opened, in Rebuttal.

LUTHER J. GLENN sworn, said: I saw prisoner the night before the killing; about 10 o'clock, P. M., I stepped into the bar-room at the Atlanta Hotel; Mr. Webb and Choice were standing at the counter alone; witness stopped at the fire, and as I halted, prisoner turned round and asked if I would not stand security for him in a ten dollar bail case; I approached the counter and told him I would, and walked up between them and said to Webb that it was unnecessary to take bond, I would see that the ten dollars was paid; Webb said if I said so it was satisfactory; prisoner then

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asked witness to drink: witness declined; prisoner then asked Webb if he would not join him in a drink; Webb declined also. At that moment prisoner, all of a sudden, commenced abusing Webb, using very abusive language, and cursing; it was a kind of explosion; I immediately got between them and kept prisoner away; my back was to Webb; Choice made no attempt to strike Webb, nor resisted me immediately; I kept talking, till finally prisoner got hold of a glass bottle, and Mr. Macoy went behind the counter and caught Mr. Choice by the hand; I looked round and motioned to Webb to get off. Previous to prisoner taking the bottle, I had told him to have no difficulty, and turned away; when Macoy got hold of Choice, I turned and saw that Webb had a pistol; I took Choice by the lappel of the coat and carried him into the adjoining room, and talked with him some five minutes or more; told him Webb was an officer, and had done his duty; I got him pacified, and told him he ought to go into the room and apologize to Webb; we walked in, but Mr. Webb was not in; I repeated the advice as to the apology, and he said: "Colonel, as soon as he comes in I will do so;" said his cause of complaint against Webb was the amount; do not recollect any threat; his idea in the room with witness was, that he ought not to have been arrested for ten dollars; at the time of the difficulty, prisoner manifested a desire to get to Webb; prisoner was as quiet as I ever saw a man when I left the room, and seemed to know he had done wrong; I heard of no further difficulty; prisoner, from his appearance, had been drinking, but was not drunk by any means; when I went into the room he was perfectly quiet, and spoke to me in a natural voice. Prisoner, in my opinion, was rational at that time; it did not occur to me otherwise; don't think I saw prisoner that day, but saw him within three days before, and conversed with him about going to New York; met him casually, and talked some fifteen minutes; said he had been engaged to travel for a New York house, and promised to call at our office before he left. At the time of that conversation he appeared rational; my acquaintance with Choice was not intimate—I may say limited; never knew him until he came here two or three years ago; I had always considered prisoner sane; had seen nothing to indicate the contrary previous to this difficulty; prisoner is a man of more than ordinary intelligence, I think.

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Cross-examination: I never investigated prisoner's mind; knew nothing of his hurt—nothing of his excitability; never saw him drunk or excited before this difficulty; my knowledge of his insanity is like the knowledge of all other men with whom I am acquainted; just seen prisoner in passing; the longest conversation I ever had with him, I think, was about a little case here in Court; at grocery prisoner treated Webb as friendly as he did witness; saw prisoner have no weapon that night; did not see Webb when he drew his pistol, but saw it in his hand; I inferred from his conduct, that prisoner had been drinking; knew no other explanation for his conduct; don't think he was drunk; did not see him drinking.

Rebuttal.

It was between 10 and 11 o'clock, P. M., when the difficulty took place.

J. A. HAYDEN sworn, says: That he remembers the day on which Webb was killed; saw prisoner on that day some twenty-five or thirty minutes before the homicide, at Thompson's Hotel; spoke and talked with prisoner some two or three minutes; saw he was somewhat in liquor, but not to be considered drunk; Ennis kept the bar; considered prisoner perfectly sane; saw nothing unusual, except that he had been drinking too much; left prisoner in the bar-room; prisoner was standing talking with some gentlemen at the bar.

Cross-examined: Did not see him drink; judged from his manner and appearance that he had been drinking; had seen him frequently in that condition before; his conduct was not that of a sober man; witness just passed the usual compliments with prisoner.

S. B. LOVE recalled by State, says: That he saw prisoner on the morning of the killing, some twenty minutes before; prisoner and Stegall were walking from the Trout House towards Atlanta Hotel; prisoner was walking locked arms with Stegall; thought, from his appearance, that he had been drinking; did not seem to steady himself in turning as a sober man would; turned his head and looked around towards witness.

Cross-examined: The reason why witness looked in to see prisoner was, because somebody said he was asleep, and he turned and looked at him

THOMAS GANNON sworn, says: That he heard a conversation between prisoner and Webb at the Trout House bar-room, on the night before the killing. Choice, and Webb, and Glenn were standing together about half-past 11 o'clock; Col. Glenn walked out; at the same time Webb came up to Choice and touched him on the thigh; both walked out together from the bar-room. Next he saw, Choice came back into the bar-room, and said to witness, "What do you suppose that damned Bailiff done?" Witness said he did not know; prisoner said he (the Bailiff) had arrested him for ten dollars, and would not take his word for the amount; witness said if he had known it, he would have paid the ten dollars himself, as prisoner was going that night to New York; prisoner told witness that Ennis had told Dr. Dowsing that he would pay the ten dollars and allow it to Dowsing on account, and that Dowsing refused to do it; Mr. Choice asked witness if he had a knife, and witness answered, no; then he asked witness if he had a pistol, and he answered, no; then he went to Spalding and asked him for a knife; then turned back and said he would cut out the Bailiff's, or Dr. Dowsing's heart, being then very much excited. After a few words of remonstrance and advice from witness, prisoner went out, witness did not know where; got a knife from Spalding; saw him afterwards coming back to the same place; witness and prisoner had a drink together.

Cross-examined: Witness' opinion was, that on the morning of the killing, prisoner was out of his mind; it is his opinion now, that, when drinking, prisoner was out of his mind.

JOHN ENNIS sworn, says: That he saw prisoner on the morning of the killing, between 9 and 10 o'clock; came into the bar-room and asked witness to make him a drink, and asked witness to take a drink with him, which he did; prisoner said to witness, you were not here last night; witness said, no; prisoner said he had been used damned mean by a rascal, or used mean by a damned rascal, the night before; asked witness if he had heard how he had been used; witness replied that he had heard prisoner had been arrested the night before; told prisoner that he had heard that he had abused the Bailiff, and said that he ought not to have done that; that Bailiff was a sworn officer and doing his duty, and not to blame; that if any blame was to be attached, it was

the plaintiff in the bail writ; told him he owed an apology to Webb. Prisoner seemed to reflect a moment or two, and said: "I believe I do, and I will apologize to him when I see him." Asked him if he had been to breakfast; prisoner said no; witness advised him to go and get breakfast; said he would go and get oysters for his breakfast; that it was too late for breakfast. That was the last conversation witness had with him; prisoner seemed like a man who had been drinking the night before, and had been sleeping.

JOHN MCGEE sworn, says: That John Gannon was keeping the Trout House bar at the time of the killing; witness had charge of the bar; saw prisoner take a good many drinks the night before; in fact, he was intoxicated—can't tell how many drinks he took. Prisoner remained in the bar-room until about 12 o'clock; prisoner was about middling intoxicated; saw deceased come in, tap prisoner, went out a while, and came in again; did not hear any threat; saw Mr. Choice next morning in bar-room between 9 and 10 o'clock; prisoner drank twice or three times that morning previous to the shooting.

Cross-examined: Has known Choice one or two years; has known him, in one of his insane ways, to present a pistol at a friend; has presented it at witness; saw him on the day after killing; looked at him particularly; he looked wild and excited; made an effort to go down the bar-room steps; the officers carried him along; he looked wild and excited, his eyes rolling around. On the occasion of prisoner presenting a pistol at witness, prisoner came down next morning and apologized like a gentleman; said he did not know that he had done it until some of his friends told him of it; thinks prisoner is insane when he takes too much drink; thinks he was insane on the day of the shooting, or he would not have done so; witness thought at the time he tried to shoot him he was insane; witness concluded before the difficulty that prisoner was insane when drinking; at the time of presenting pistol at witness, prisoner was drinking.

E. T. HUNNICUTT, Marshal, sworn, says: Witness and Mr. Branen carried Choice to Calaboose after killing; as they were going on past the Trout House, prisoner asked witness where the nearest prison was; witness said the Calaboose was the nearest; prisoner said put him in, and not let them hurt him; heard voices all around him crying out, "Hang

him!" "God damn him, hang him!" It was after the bries had been made that prisoner remarked to witness as to where is the nearest prison; to put him in it, and not let them hurt him; witness told prisoner they should not hurt him while he had charge of him; witness pulled up then pretty fast. This is all prisoner said at that time; this took place about 11 o'clock, A. M.

Cross-examined: No questions.

D. H. BRANAN sworn, says: As we were coming from Milledgeville last April, prisoner, Jones and Cobb were all together; as we were coming near Williams' Station, witness went and set down by Mr. Choice; witness said to prisoner, the circumstances were different from the time that they rode together on the train before; prisoner said yes; witness told prisoner that he did not think, when they went on to Milledgeville together, when witness carried old man Terry down there, that they would come back that way; prisoner then asked witness something about old man Terry; was talking about him; prisoner said old man Terry was sorter funny; old man Terry had some little books along. Witness said something about old man Terry writing poetry; witness said to prisoner, (called him Bill,) it came very near being me that had to serve them papers on you; told prisoner the reason he did not do it; thinks prisoner said, I wish it had been you, it might have been different; that Mr. Webb did not treat him exactly right, he didn't think. Witness thinks he told prisoner he always tried to treat every one right; that he had had no difficulty as yet, or something that led to that. Prisoner told witness how it happened, or something; when deceased came to him, he told him Dr. Dowsing was owing John Ennis, and that Mr. Ennis would give Dr. Dowsing credit for the amount; Mr. Webb refused to settle it in that way, and he thought he ought to have done it, as Dowsing was owing John Ennis; said that he was drinking, and Mr. Webb knew that he was, and ought not to have treated him so. Witness said he had heard something of him (prisoner) going to leave on night before difficulty; that he had made an arrangement with some New York house. Prisoner said he was not going to leave, and told Mr. Webb so; prisoner said that he and Webb went to see Ennis to get him (Ennis) to credit what he (prisoner) owed Dowsing on what Dowsing owed Ennis; prisoner said nothing about what occurred in the bar-room of Mr. Ennis.

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THOMAS U. WILKES sworn, says: The killing of Webb, he thinks, took place on Friday, the 30th of December. On the next morning, (Saturday,) witness received a request to visit Mr. Choice in the Calaboose; witness went to the Calaboose about 10 o'clock, A. M., and found a crowd assembled, and a good deal of excitement. It was thought advisable not to go in then; there was a meeting at the City Hall, and it was thought advisable not to go in until the result of that meeting was known. Witness supposes it was between 12 and 1 o'clock when he got in; found Mr. Choice under a very deep state of feeling, and he told witness the object of his request, and commenced and gave witness an account of the steps he had taken, which led to the crime for which he was then imprisoned; prisoner alluded to his mother with a good deal of emotion—a very excellent and pious mother; spoke of her counsels to him, and if he had heeded those counsels, he would not at that time be imprisoned for the crime he was; but stated he had torn himself away from his mother and her counsels and influences, and thrust himself upon other and vicious society; by which he was led to the grog-shops, to the billiard table or saloon; not certain which he used—where he was, he was brought under the influence of vicious society, by which he was led into the habit of drinking, and that to drink he ascribes the act for which he was then imprisoned; stating at the same time that when he (prisoner) was under the influence of liquor, he was either like a mad man or a fool, don't recollect which; he stated that he had nothing against deceased to justify the deed, and that he would not have killed him for the world, if in his proper mind. He then requested me (as I was to preach the funeral of Mr. Webb on the next day; he conceived the idea that I was to preach the funeral of Webb, from the conversation, or some other way) to allude to the steps which he had taken, and led to his ruin, and warn all young men of adopting a similar course from him and his sad example. Further, he requested that I should warn all young men of adopting a similar course; adding, that he regarded no young man as safe whose associations were vicious; Mr. Choice stated that such associations would lead young men to drink, and he thought there was no security when the young man took to his cups; stated, also, that his prospects in life had been flattering. Witness thinks his turn was as good as any

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young man in the country; but by drink, his prospects were then all cut off, and that he was a ruined man, and that he then had but one object before him at all, and that was to endeavor, if such a thing might be, in such a case, to seek the pardon of his sins, and a preparation to meet his Maker. Mr. Choice attributed the act exclusively to drink.

Cross-examined: Says that he does not know that he used the term "exclusively;" he gave no other cause.

SAMUEL WALLACE sworn, says: On the day of the killing, witness was coming down Decatur street, in front of Thompson's Hotel; in a bar-room door this way saw Mr. Choice and some other gentlemen; that is, the man they called Choice; witness had a hickory in his hand, with a rope tied to the end of it about two feet long; he took it out of my hand and asked what I used it for; witness told him he drove his horses or oxen with it; he laughed and handed it back; witness stepped off the walk, and Mr. Webb and Mr. Cason, witness thinks is the gentleman's name, were standing together on the plank walk to the Car-shed. This man Choice, as they call him, fired a pistol, and witness thought, as it was the last day of the year, it was some sport between the two men. Webb stepped off the walk, and, said he, "Don't shoot." This man, Mr. Choice, raised his hand, and said, "God damn you, I will kill you any how." The pistol fired, and Mr. Webb staggered and fell, and Choice started to walk off, and said, "You will take that?" or "damn you, take that," don't know which, and walked under the shelter of the Trout House, and beckoned from where he came two or three times with his finger; he then went out of witness' sight. When witness first saw Choice, he took him to be drinking—had that appearance. It was but a short time between the time Webb and Choice was talking, until the firing of the pistol.

Cross-examined: Says he is the witness who testified in a case of Carlisle vs. Flowers by interrogatories; don't know which took his interrogatories; just passed Mr. Choice on the day of killing.

State closed here again.

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Evidence for defence in Rebuttal.

H. W. BROWN re-introduced, says: That the evidence he has heard has not changed his mind from the impression he first gave.

Cross-examined: Has heard McGee's, Wallace's, Glenn's, Wilkes', and a good part of Mr. Ennis' evidence, but not the balance of the evidence on the part of the State; does not pretend to say what was the cause of the insanity; says that the state of mind might be caused by alcoholic stimulants. Witness testifies that he regards these paroxysms as temporary that he has been testifying to.

WILLIS F. WESTMORELAND re-introduced, says: He has heard McGee's, Mr. Branan's, a portion of Mr. Ennis', and a portion of Mr. Wilkes', and a portion of Mr. Hunnicutt's: the evidence he has heard has no effect in changing his opinion.

Cross-examined: Did not hear Judge Hayden's; did not hear all of Wilkes'; did not hear Glenn's last night; did not hear all of Mr. Love's nor Mr. Gannon's testimony given in. Did not hear any of Hayden's or Gannon's; his opinion is, that the subject might have been insane; does not pretend to say what was the cause; liquor will cause the state of mind described by the witnesses. Heard Branan's testimony; heard Wilkes'; heard McGee's; heard Wallaces'; did not hear Ennis' distinctly; was in the room when Hunnicutt testified; heard a portion of his testimony; does not recollect any of Gannon's; did not hear any of Mr. Ennis'.

The defendant here closed his testimony, and the presiding Judge charged the Jury as follows, to-wit:

JUDGE BULL'S CHARGE TO THE JURY.

GENTLEMEN OF THE JURY: You have been impaneled to try a most important issue, and during the progress of this trial you have often been reminded of its momentous importance; and it is true that it is one of the most important issues that can be committed to a Jury: it is one of vital importance to the accused, because with him it is a question of life and death; it is one of no less importance to the public, by its laws, to protect its citizens in the enjoyment of their lives, their liberties, their reputation, and their property; it is in return for this protection that the citizen owes obedi-

ence to the Government. The reason that you cheerfully pay your taxes and render your personal services to the Government as Jurors, or as soldiers, is, that the Government spreads the ægis of its protecting laws over you and your families, even in defenceless slumbers. And this protection can only be afforded by an impartial and rigid enforcement and vindication of the laws.

The prisoner at the Bar, William A. Choice, is indicted for the murder of Calvin Webb, committed, as alleged, on the 30th day of December, 1858; and on the State devolves the burden of establishing this charge by proof.

Every criminal trial is commenced with the presumption that the accused is innocent, and this presumption continues until rebutted by such proof as convinces the mind of his guilt beyond a reasonable doubt.

The first inquiry that naturally arises in the solution of this question of guilt or innocence to be determined in this case is, Has a *homicide* been committed? Has it been shown that Calvin Webb has lost his life by the hand of violence? and if so, was that act committed by the prisoner at the Bar? If these facts are found to be true, the next inquiry is, What is the character of that homicide? For there are several grades of homicide recognized by the Law, involving different degrees of punishment: such as murder, voluntary and involuntary manslaughter, and justifiable homicide. The defendant in this case is indicted for murder, and, in the opinion of the Court, there can be no intermediate verdict between that of guilty of murder and that of not guilty; and it is therefore unnecessary to charge you on the minor grades of homicide. Murder is the unlawful killing of a human being in the peace of the State by a person of sound memory and discretion, with malice aforethought either expressed or implied. Expressed malice is that deliberate intention to take away the life of another, which is manifested by external signs capable of proof: such as a previous quarrel, threats, some expressed grudge, and the like. And when no considerable provocation appears, and all the circumstances of the killing show an abandoned heart, the Law implies malice. When the homicide is proven to have taken place by unauthorized violence, the Law presumes that it was committed with malice aforethought, unless the accompanying proof shows that it was done without malice. So that it is suffi-

cient for the State, in order to make a *prima facie* case of murder, simply to prove the killing, and then the burden of proof is thrown on the defendant to absolve himself of the guilt of murder.

The defense set up in this case is, that the defendant, if he committed this act, was not, at the time, of sound memory and discretion; that, by deprivation of reason, he was not legally responsible for his acts at the time the deed was committed.

It is true, that according to all recognized principles of Law, Divine and human, an individual bereft of reason, either by the act of Providence, by accident, or by his own act, with one exception, is not responsible, legally, for his acts committed while in that condition.

This is the general principle, subject to such qualifications as I will presently mention.

According to the language of our Penal Code, a man must be of sound memory and discretion; and the next inquiry is, to determine what is the legal meaning of that phrase; for it is not every grade of insanity that will excuse the committing of crime, and render an individual irresponsible for his acts.

Mental unsoundness has been divided into various classifications by the learned medical authorities; but I will not confuse you or myself by attempting to notice all these learned distinctions. The simple rule laid down by the Law is this: That if a man has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act in question: if he has knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, he is, in the eye of the Law, of sound mind and memory. Our Penal Code defines a sound mind in nearly similar terms.

It lays down the rule: "A person shall be considered of sound mind who is not an idiot, a lunatic, or affected by insanity; or who hath arrived at the age of fourteen years, or before that age, if such person know the distinction between good and evil."

But though it is the general rule that insanity is ordinarily an excuse, yet there is an exception to this rule, and that is, when the crime is committed by a party in a fit of intoxication, though the party may be as effectually bereft of his

reason by drunkenness as by insanity produced by any other cause. A voluntary contracted madness is no excuse for crime. The Law does not permit a man to avail himself of his own gross vice and misconduct, to shelter himself from the legal consequences of such a crime. The broad rule is, that drunkenness is the exception to the general rule; but the crime to be within this exception, and therefore punishable, must take place, and be the immediate result of the fit of intoxication, and while it lasts and the mere consequence of insanity, remotely occasioned by previous habits of excessive indulgence in liquor. The Law looks to the immediate, and not to the remote cause which produced it. To illustrate this idea: (If, by a long practice of intoxication, an *habitual* or *fixed* insanity is caused, or a permanent injury to the mind produced—although this madness was at first contracted voluntarily, yet the party is in the same situation in regard to responsibility for crime, as in a state of insanity caused by nature or accident.)

But if the ordinary condition of a man's mind, when free from the excitement of liquor, is regular, capable of understanding the moral quality of his acts, of speaking, reasoning and acting coherently, and he voluntarily deprives himself of reason by intoxication, and commits an act while in that condition, he is responsible.

Nor does it make any difference that a man, either by former injury to the head or brain, or constitutional infirmity, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts in that condition. (But if a man is insane when sober, the fact that he increased the insanity by the super-added excitement of liquor makes no difference. An insane man is irresponsible, whether drunk or sober.)

The rule laid down by our Penal Code, is: "That drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, artifice, or contrivance of another."

So that the deduction from all their rules is, that if the insanity was the immediate consequence of drunkenness, it is no excuse in Law, though the former injury may have rendered him more liable to be crazed by liquor than if he had never received it; for a man in such a condition, if sane

while sober, has no right to indulge a morbid appetite, at the expense of risk to the lives of others. And to lay down any other principle, would produce consequences to society which the imagination can better conceive than words describe.

These are the rules for determining the question of insanity, and the degree and nature of insensibility to the Law.

There is another principle connected with the subject, and that is, that the Law presumes every man of sound mind until the contrary appears; and the burden of proof is always on the defendant, to show that at the time of the commission of the act, he was not of sound mind. And it ought to be made to appear to a reasonable certainty—to your reasonable satisfaction, that at the time of the commission of the act the party did not know the nature and quality of the act, or if he did, did not know that the act was wrong.

And it now devolves on you to decide whether the defendant has, by proof, rebutted this legal presumption of sanity. And this, like the other injury, is to be determined by the testimony.

Evidence on the question of mental soundness or unsoundness consists of facts and circumstances tending to prove the one or the other, and of the opinion of witnesses in connection with the facts detailed by them, and the opinion of experts founded on the facts proven.

The opinion of witnesses unskilled on such subjects is entitled to no weight disconnected with the facts, and though great respect is due the opinions of gentlemen of the Faculty, skilled in such matters by reason of their superior skill and advantage for understanding the operations and the phenomena of the human mind, yet it is at last from the facts proven that a Jury are mainly to decide. They are not bound by any opinion, unless that opinion is sustained by the facts proven.

These are the principles of Law governing this case, and it is exclusively your province to apply them to the facts of this case, and to render a true verdict according to the evidence, and according to nothing else.

If, after mature deliberation, you are satisfied beyond a doubt that the prisoner is guilty, you will find him so. If not, you will find him not guilty.

It is to be regretted that any illusion should ever be made before a Jury in charge of such a case as this, to outside in-

fluences—to the state of public opinion, or any other circumstances by which it would be improper that a Jury should be influenced.

If, upon deliberation, there is a reasonable doubt left on your mind of the guilt of the accused, the humanity of the Law gives to the accused the benefit of that doubt, and makes it the duty of the Jury to acquit.

By a reasonable doubt, is meant such a doubt as now arises from the testimony, in the mind of a reasonable man, and leaves it hesitating, unsettled, and undecided.

Absolute certainty is not to be attained by any mode of judicial investigation. A moral or reasonable certainty is all that the Law requires, and all that is attainable.

And now, gentlemen, this case is fully committed into your hands as judges of the Law and of the facts. I do not permit myself to suppose that you will be influenced by anything outside of the testimony of the case, or to doubt that you will discharge your duty fearlessly, independently and impartially.

The Jury, after deliberating about two hours, returned a verdict of guilty.

Counsel for the defendant then made a motion for a new trial of said case, on the following grounds, to-wit:

First: Because the Court erred in refusing to allow the witness (Daniel S. Printup) to state in evidence the following facts: "That a short time after the homicide was committed, he visited prisoner, and, for the purpose of testing his sanity, informed prisoner, amongst other things, that it might be very important in his defence to know from whom he procured the pistol with which he shot deceased, for the two-fold purpose of proving by the person from whom he procured it, his condition of mind at the time, and also to show that the pistol was not the property of prisoner, and that it could not be ascertained from any other person, from whom it was procured; and that he (witness) said nothing to the prisoner but what would render it to his interest to disclose the fact, if he knew it; to all of which prisoner replied, that he had no recollection whatever of having a pistol, nor of any person from whom he did or could procure it, and had no recollection of shooting, or even seeing deceased." And also in refusing to allow said witness to state the means adopted by B. H. Hill to test the sanity of prisoner at the time of commit-

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ting the act, before he was employed to defend prisoner (And in refusing to allow the counsel to state before the Court what facts he did propose to prove on this subject.)

The presiding Judge certifies, relative to this ground "That the counsel only proposed to prove a conversation with the prisoner by himself some three months after the homicide."

Second: Because the Court erred in refusing to allow prisoner to prove, that owing to the diseased condition of his mind, the family and friends about Rome had long refused to allow prisoner to have deadly weapons.

Relative to this ground, the Judge certifies: "That he has no recollection of any offer to prove any control, or attempt to control, the defendant, in the carrying of weapons, or any refusal to permit him to carry them. The witness did testify that the family had endeavored to prevent his carrying pistol."

Third: Because the Court erred in allowing the State to prove in rebuttal, by Luther J. Glenn, the difficulty between prisoner and deceased the night before the homicide as evidence of express malice, and to the same point, in allowing the evidence of Thomas Gannon and Samuel Wallace.

Fourth: Because the Court erred in allowing Luther J. Glenn and J. A. Hayden to give their opinions as to the sanity or insanity of the prisoner, and in allowing them to give their statements that prisoner was "drinking," when such statements were given as conclusions, and not as facts.

Relative to this ground, the Judge certifies: "That he heard no objection to the testimony at the time it was given in; and that the opinions of witnesses (other than experts) as to the sanity or insanity of the defendant, was first introduced by the defendant's counsel, and at their instance; and after objection made by counsel for the State, the testimony was admitted by the Court, with the distinct avowal, that as that question was somewhat unsettled, if the defendant's counsel insisted on it, the evidence would be admitted, with the condition that the rule should work alike in favor of both sides, and the defendant's counsel expressly accepted the condition."

Fifth: Because the Court erred in this: When the State had closed its rebuttal testimony, the defendant re-introduced Dr. H. W. Brown and Dr. W. F. Westmoreland, to prove

that the additional facts proven in rebuttal, taken as true, did not change their opinions of the insanity of the prisoner at the time of the killing. Each witness stated that he did not hear some of the witnesses in rebuttal, when the defendant moved that these facts be read to them, which the Court would not allow to be done.

To this ground the presiding Judge annexes the following qualification, to-wit: "That this motion was made as to Dr. Westmoreland, who stated that he was present while the witnesses were being examined, but did not hear all their testimony; that at the request of defendant's counsel, the Court had permitted portions of the testimony to be read over in the hearing of the medical witnesses as a foundation for their further examination, but refused to allow it any further, stating that counsel might state the facts hypothetically, and ask the witnesses their opinion upon them."

Sixth: Because the Judge erred in failing to include in his charge to the Jury the Law on all material facts proven in the evidence and insisted on by counsel for the defence; and especially in not charging the Jury as insisted on by counsel for the defendant before the Jury, whether the prisoner was or was not responsible for crime, if, by reason of the injury to his brain or otherwise, he was afflicted with the disease called *oinomania*, and by reason of this disease was irresistibly impelled, by a will not his own, to drink, and after being so impelled, did drink, and thus become insane from drink, and whilst thus insane committed the homicide. And also in not charging the Jury as insisted on by counsel, that if they believed the prisoner had suffered by injury or otherwise, a pathological or organic change in his brain, which produced the disease of *oinomania*, and by this disease was irresistibly impelled to drink liquor, and from the liquor thus drank became insane, and while thus insane killed the deceased, he was not guilty of murder.

Seventh: Because the Court erred in charging the Jury, that if the prisoner labored under a disease of the brain, which did not render him insane, but, notwithstanding the disease, knew right from wrong when sober, and then drank liquor, which produced madness or insanity, and killed the deceased, he was guilty of murder.

To this ground the Judge annexes the following, to-wit: "For this, and all other exceptions to the charge, the charge itself is referred to."

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Eighth: Because the Court erred in refusing to charge the Jury in language or substance, as requested by defendant's counsel in writing, as follows: "If they believe that the prisoner was insane when he left Rome, and came to Atlanta, and continued insane until he killed deceased, then the fact that he drank liquor in the meantime cannot render him liable, but he must be acquitted of murder.

Ninth: Because the Court erred in charging the Jury that insanity, produced proximately by drunkenness, is no excuse for crime, and no palliation for crime.

Tenth: Because the Court erred in charging the Jury, that insanity was an excuse for crime, unless such insanity was produced by liquor.

Eleventh: Because the Court erred in charging the Jury, that they could not find the prisoner guilty of any grade of homicide below murder, and that he was guilty of murder or not guilty at all.

Twelfth: Because the verdict of the Jury was contrary to Law, and contrary to evidence.

Thirteenth: Because the verdict was strongly and decidedly against the weight of the evidence.

Fourteenth: Because the Court erred in refusing to allow the defendant to prove by Printup and Hooper, and others, the family and neighborhood reputation of the prisoner as being permanently injured in his mind, and the contemplation before the homicide was committed, of confining him as a lunatic.

To this ground the Judge annexes the following: "The witness was proceeding to state, that for some time after the injury, fears were expressed by the family, or some of them, that his mind would never entirely recover from the effects of the injury, when counsel for the State objected to the testimony, and it was rejected. I have not the slightest recollection that any offer was made to prove any intention or design to confine the prisoner as a lunatic, or for any other cause."

Fifteenth: Because the Court erred in submitting to the Jury the question of drunkenness, as explanatory of the prisoner's condition at the time of the homicide, and that the defendant could not protect himself from the responsibility of one crime, when committed during insanity produced by another crime voluntarily assumed.

Sixteenth: Because the charge of the Court, as a whole, and in each of its parts, was error, in that it submitted to the Jury questions not made by the issues and facts, and did not submit to the Jury the questions made by the issues and the facts.

To this ground the Judge appends the following: "After the charge was concluded, the Court asked whether the counsel on either side wished any further charge, and no response was given by either."

Seventeenth: Because the verdict of the Jury was contrary to evidence in this: that it was against all the evidence of the experts and medical witnesses on the question of insanity; and also against the evidence of the opinions of every witness who gave his opinion on the subject of sanity or insanity, and who saw the killing, and who were intimately acquainted with the condition of the prisoner on the day of the homicide.

Upon the hearing of the same, the presiding Judge overruled the motion on all the grounds taken in the rule, and refused the new trial, and error is assigned upon that decision, and upon the following charge of the Court, to-wit: "Though great respect is due the opinions of the gentlemen of the Faculty, skilled in such matters, by reason of their superior skill and advantages for understanding the operations and phenomena of the human mind, yet it is, at last, from the facts proven that a Jury are mainly to decide; they are not bound by any opinions, unless the opinions are sustained by the facts proven."

B. H. HILL, A. R. WRIGHT, and CALHOUN & SON, for the plaintiff in error.

THOMAS L. COOPER, Sol. Gen'l, for the defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

To avoid being tedious, I was strongly inclined to pass in silence all the minor points in this case. They were not dwelt upon by the able counsel in the argument. On account of the importance of the case, however, I concluded that every assignment of error had best be noticed. I shall dispatch them with as much brevity as possible.

When the Bill of Exceptions was presented to Judge Bull for his signature, he made in his own hand-writing, several corrections of the facts as therein stated. To these additions, counsel for the plaintiff in error object; and it becomes necessary, therefore, to dispose of this preliminary point before proceeding further.

After verdict, a rule *nisi* was moved for a new trial. The motion was ordered to be entered upon the Minutes. Upon hearing the application, it was refused. It is now insisted that the rule *nisi*, by being placed upon the Minutes, became a record, importing absolute verity, and that it is not competent for the presiding Judge to alter or modify the statement of the facts as set forth in the rule *nisi*, when he comes to certify subsequently to the Bill of Exceptions.

Is this position tenable? The rule *nisi* was, upon the hearing, denied; perhaps partly because the statements in it were not true and consistent with what transpired on the trial. At any rate, this is a sufficient reason for refusing such an application. The only effect of placing the motion upon the Minutes was, to show that such a motion had been made at that Term of the Court, and upon the grounds therein stated. That could not be controverted. But it did not concede that the facts therein stated were true.

1. It is complained that the Court erred in refusing to allow the witness, Daniel S. Printup, to state in evidence the following facts: That a short time after the homicide was committed, he visited prisoner, and, for the purpose of testing his sanity, among other things, informed prisoner that it might be very important in his defence, to know from whom he procured the pistol with which he shot deceased, for the two-fold purpose of proving by the person from whom he procured it, his condition of mind at the time; and also, to show that the pistol was not the property of the prisoner; and it could not be ascertained from any other person from whom it was procured; and that he said nothing to the prisoner but what showed that it would be to his interest to disclose the fact, if he knew it: when the prisoner replied, that he had no recollection, whatever, of having a pistol, nor any person from whom he could, or did, procure it; and had no recollection of shooting, or even seeing the deceased.

And also, in refusing to allow said witness to state the means adopted by B. H. Hill to test the sanity of the pris-

oner at the time of committing the act, before he was employed to defend prisoner, and in refusing to allow the counsel to state before the Court what facts he did propose to prove on this subject.

To this first ground of alleged error in the Bill of Exceptions, the Judge appends this note: "The counsel only offered to prove a conversation with the prisoner, by himself, some three months after the homicide."

Let us look at this ground for a moment, apart from the qualifying statement added by the Judge:

If the prisoner were sane at the interview between Col. Printup and himself, and he is deserving of the reputation which he has always sustained, of being a young man of more than ordinary talents, it would have occurred to a much duller intellect, in the twinkling of an eye, to have feigned entire ignorance and forgetfulness of the whole transaction, as much more available to his defence than any information he could communicate upon the points, to which his attention was directed.

What tests were applied by Mr. Hill, the powerful and indefatigable champion of the accused, we are not informed. We know that Mr. Hill does not profess to be an expert; and if he did, we are not aware that the Law recognizes any such mode as the one pursued in this case for testing the sanity of culprits. It is not the conduct or declarations of the party, at the time of the act, which are sought to be proven as a part of the *res gestæ*, but matters transpiring subsequently. In the hands of honorable men—and the character of those concerned in this matter are above suspicion—a precedent like this might not be so mischievous. It is a practice, however, so liable to abuse, that we think it safer to discourage so dangerous an innovation.

We were glad that no point was made, in the argument, upon the refusal of the Court to allow counsel to state before the Court, and, of course, *in the hearing of the Jury*, what facts he did propose to prove as to the matter we have been discussing.

2. The second assignment of error is, in the Court's refusing to allow prisoner to prove that, owing to the diseased condition of prisoner's mind, the family and friends about Rome had long refused to allow him to have deadly weapons.

To which the Court adds: "I have no recollection of any

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offer to prove any control, or attempt to control, the defendant in carrying weapons, or, any refusal to permit him to carry them. The witness did testify that the family had endeavored to prevent prisoner from carrying a pistol."

As the presiding Judge refuses to certify that the facts stated in this ground are true, it is needless to review it. It is a very immaterial matter, at best. For what prudent family would not have dreaded to see deadly weapons in the hands, or about the person, of William A. Choice—one who, while in his cups, as all the proof demonstrates, was so dangerous, both to friend and foe?

3. The third complaint is, in allowing the State to prove, in rebuttal, by Luther J. Glenn, the difficulty between prisoner and deceased, the night before the homicide, as evidence of express malice, and in allowing the evidence of Thomas Gannon and Samuel Wallace to prove the same point.

The State having proved the homicide, closed, as the Law would imply malice from the killing. To rebut this presumption, the plea of insanity was interposed, and a large amount of evidence adduced to support it. An insane person is not supposed to act from malice. Does it not weaken the force and effect of the prisoner's defence, to show express malice?

Who would not more readily believe that the prisoner was insane, had he shot a friend or an indifferent person, as he frequently threatened to do, but, as usual, *failed or forebore*, instead of one against whom he manifestly harbored a spirit of revenge for a supposed insult or injury? A drunken man rarely, if ever, shoots or stabs another, unless he cherishes some resentment toward him. It is quite otherwise with the insane. A drunken man reasons from correct data; whereas the insane draw right conclusions from false data.

In this view of the testimony, it was strictly in rebuttal.

But this question has been repeatedly decided by this Court; that is, that the introduction of testimony, whether cumulative or in rebuttal, or for any other purpose, is entirely within the discretion of the Circuit Courts. We said, in one case, that in no case could we consent to reverse the Circuit Judge, for letting in testimony which was relevant, at any stage of the case. *Bryan vs. Walker*, 20 Ga. Rep., 480; *Lumpkin vs. Williams*, 19 Ga. Rep., 569; *Walker vs. Walker*, 14 Ga. Rep., 242; *Bird vs. The State*, id., 43.

In this last case, the Court say: "The State relied upon

the facts first proven, as making out a clear case of malice—the malice ingredient being implied, as it clearly was reasonably to be implied, from all the circumstances of the killing. The prisoner then put in evidence, facts which went to some extent in rebutting the presumption of malice. The State, then asked leave to strengthen its case, by proving express malice; and it being granted, the prisoner excepted.” “I confess,” says the learned Judge who wrote out the opinion, “my inability to see upon what ground. Surely it is not necessary to discuss this point.”

4. The next assignment is, that the Court erred in allowing Luther J. Glenn and J. A. Hayden to give their opinions as to the sanity or insanity of the prisoner; and in allowing them to give their statements, that “the prisoner was drinking,” when such statements were made as conclusions, and not as facts.

The Judge subjoins a note to this exception, to this effect: “I heard no objection to this testimony at the time it was given. The opinions of witnesses, other than experts, as to the question of the sanity or insanity of the defendant, was first introduced by defendant’s counsel, and at their instance; and after objection made by the State’s counsel, was admitted by the Court, with the distinct avowal, that as the question was somewhat unsettled, if the defendant’s counsel insisted on it, the evidence would be admitted, with the condition, that the rule should work alike in favor of both sides; and the defendant’s counsel expressly accepted the condition.”

Perhaps it would be better to dismiss this point, without a word of comment. Unless the memory of the Judge is greatly at fault, this ground should never have been incorporated in this Bill of Exceptions. When parties stipulate expressly with each other and with the Court, that a certain course shall be pursued in the management of a cause, that agreement should be considered binding, more especially when the record shows, as it does most abundantly in this case, that the defendant has reaped the full benefit of the rule of evidence thus agreed to. Still, that it may not be said that any injustice has happened or fallen to the accused for want of recollection in the presiding Judge, I propose to examine this fourth ground to some extent.

It has been the settled doctrine of this Court, from its organization, that the opinions of witnesses, other than experts,

are admissible as to matters of opinion, especially as it respects sanity or insanity, provided such opinions be accompanied by the facts upon which they were founded. *Potts and others vs. House*, 6 Ga. Rep., 324; *Walker vs. Walker*, 14 Ga. Rep., 242; *Bryan vs. Walton*, 20 Ga. Rep., 450; *Goodwyn vs. Goodwyn*, *id.*, 600. Our Books are full of precedents upon this point.

As for myself, I would rely as implicitly upon the opinion of practical men, who form their belief from their observation of the appearance, conduct and conversation of a person, as I would upon the opinions of physicians, who testify from facts proven by others, or the opinions even of the keepers of insane hospitals.

But the question in all such cases is, not which is the most reliable evidence, but the inquiry is, Shall the witnesses be restricted, in their testimony, to a simple statement of facts coming within their knowledge, leaving the Jury to draw an inference of sanity or insanity, or may the judgment of the witnesses, founded on opportunities of personal observation, be also laid before the Jury, to assist them in forming a correct conclusion? One who has seen and conversed with an insane person, and observed his countenance and behavior, has an impression made upon his mind which is incommunicable. This Court is committed to the rule, that the Jury, in such case, is entitled to the benefit of this *impression*.

It may be said that Col. Glenn's opportunity of observing and judging of the capacity of Choice was too limited. But it has been truly remarked, that so different are the powers and habits of observation in different persons, that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than, in fact, it has enabled the observer to form a belief or judgment thereon.

Col. Glenn had known prisoner for several years, though not intimately; had met him within the last three days before his arrest by Webb; learned from him that he was about going to New York, having engaged to travel for a house in that city; always considered him sane, and a man of more than ordinary intelligence.

Before dismissing, finally, this 4th exception, upon which I am fully conscious of having occupied too much time already, I would suggest, that it does not fairly represent the testimony of Glenn and Hayden. Their testimony, when

taken altogether, is wholly unexceptionable. Glenn, for instance, says "prisoner, *from his appearance*, had been drinking;" and Hayden, upon his cross-examination, swore, that, "although he did not see Choice drinking, yet he judged, *from his manner and appearance*, that he had been drinking; had seen him frequently in that condition before."

By reading the testimony, it will be seen that expressions similar to that excepted to, abounds on every page of it. The witness, Gregory, says: "Saw prisoner a short time before he left Rome for Atlanta; had been drinking several days; does not know that he was drinking; *was acting like a man who had been drinking.*" Again, by the same: "thought, at the time he left Rome, the exciting cause of prisoner's insanity was liquor." Echols testified: "Prisoner appeared to be drinking; witness supposed him to be drunk." Bartlett sworn: "Did seem like a drunken man."

After such expressions as these, selected almost at random from the answers of the prisoner's witnesses, it would seem rather captious to object to the statements of Glenn and Hayden, that prisoner "appeared to be drinking." Such expressions, both in ordinary life and in the Courts, convey to the mind, with sufficient certainty, the condition of a person, so as to enable one to pronounce a decision thereon, with reasonable assurance of its truth. Really, no other rule is practicable. If the witness must be confined to a simple narration of facts, how the person leered or grinned, how he winked his eyes or squinted, how he wagged his head, &c., all of which drunken men do, you shut out, not only the ordinary, but the best mode of obtaining truth.

We reiterate, then, what we have said from the first—that, legally and philosophically considered, there is no merit in this objection. And in the case before us, what benefit would it be to the cause of the accused, to exclude this truth? Did not Choice himself state to D. H. Branan, when sober and sane, that he "was drinking that night; that Webb knew that he was, and ought not to have treated him so?" Why, I ask, should Mr. Webb know it, any more than Glenn and Hayden, except from his conduct and appearance? But all the proof shows that such was his condition, the night before the homicide was committed.

5. In the next place, it is complained, that when the State had closed its rebutting testimony, the defendant re-intro-

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duced Dr. H. W. Brown and Dr. W. F. Westmoreland, to prove that the additional facts, proven in the rebutting testimony, did not change their opinions of the insanity of the prisoner at the time of the killing. Each witness stated that he did hear some of the witnesses in rebuttal; when the defendant moved that these facts be read to them from the evidence as taken down, which the Court would not allow to be done.

To this assignment of error the Court adds: "This motion was made as to Dr. Westmoreland, who stated that he was present while the witnesses were being examined, but did not hear all their testimony. I had, at the request of defendant's counsel, permitted portions of the testimony to be read over in the hearing of the medical witnesses, as a foundation for their further examination; and refused to allow it any further, stating that counsel might state the facts hypothetically, and ask the witnesses' opinion on them."

We understand the Law to be this: Medical men are permitted to give their opinion as to the sane or insane state of a person's mind, not on their own observations only, but on the case itself, as proved by other witnesses on the trial. And while it is improper to ask an expert what is his opinion upon the case on trial, he may be asked his opinion upon a similar case hypothetically stated. And this the Court expressly offered to permit the defendant's counsel to do. What more could be asked? The Judge was not bound to read, or suffer to be read, the testimony as taken down. He had already allowed this indulgence, at the request of the counsel; still, it was a matter of favor, and not of right.

I shall, for the present, pretermitt the sixth, seventh, eighth, ninth and tenth grounds of error, and consider them together hereafter, in connection with the fifteenth and sixteenth assignments.

6. The next error which I shall discuss, is the eleventh ground in the motion for a new trial: because the Court charged the Jury, that they should not find the prisoner guilty of any grade of homicide below murder, and that he was guilty of murder, or not guilty at all.

This ground is not correctly stated, in the motion for a new trial, but differs in a material point from the charge as given to the Jury; and this discrepancy illustrates the propriety of the view expressed in the beginning of this opinion upon the

preliminary question. Judge Bull would have been justified in refusing the motion for a new trial upon this ground, because it does not state correctly his charge given. Instead of saying to the Jury, by way of *direction*, that they should not find the prisoner guilty of any grade of homicide below murder, and *that he was guilty of murder, or not guilty at all*, the charge was this: "There are several grades of homicide recognized by the Law, involving different degrees of punishment: such as murder, voluntary and involuntary manslaughter, and justifiable homicide. The defendant in this case is indicted for murder, and, *in the opinion of the Court*, there can be no intermediate verdict between that of guilty of murder, and that of not guilty; and it is, therefore, unnecessary to charge you on the minor grades of homicide."

In the one case, his charge is in the form of *direction*; in the other, it is the *expression of an opinion* merely, and, for that reason, declining to instruct the Jury as to the minor grades of homicide, but, at the same time, leaving the Jury untrammelled by his judicial fiat.

And we concur fully in opinion with the presiding Judge, that the killing was murder, or excusable on account of the insanity of the accused. If Wm. A. Choice was sufficiently rational to be criminally responsible for his acts, the killing of Calvin Webb was, in the eye of the Law, *murder*, without provocation, and without one mitigating circumstance: if insane, he was entitled to a verdict of acquittal; and there can be no intermediate ground. And for the Court to have charged the Jury as to manslaughter, would have been foreign from the case made by the pleadings and the proof. No such defence was set up for the accused; no such request was made of the Court. In *Boyl against the State*, 17 Ga. Rep., 194, this Court held, that it was not error to refuse or omit to give in charge to the Jury, portions of the Penal Code which have no application to the issue submitted upon the pleadings and proof. And the Court, in that case, say: "We ask, what had the law of manslaughter to do with this case?" What a mockery and farce, for the presiding Judge to have instructed the Jury as to involuntary manslaughter! and yet, he is charged with "manifest error," in omitting to add this! He would have been guilty of manifest folly, if he had. Had there been any evidence, in the case before us, upon which the Jury might have mitigated the offence from

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murder to a lower grade of homicide, it would have been different. There was not a scintilla of proof to that effect. Without the shadow of excuse, Choice, with deliberate aim, shoots down an unoffending citizen, in the peace of the State. If the Law is administered, his life must atone for it, if he be subject to punishment; if he be not, it is fit and proper that he go free altogether, as would the infant and the idiot.

7. It is alleged as error in the Court, that it refused to allow the defendant to prove by Printup, Hooper and others the family and neighborhood reputation of prisoner as injured permanently in his mind, by reason of the injury he had received. No authority is produced to justify the proof of a particular fact by general reputation—a fact, too, in which the public were not concerned. We know of no rule which would allow the introduction of this kind of hear-say testimony. In *Wright against Tatham*, 1 *Ad. and AL.*, 3, 8, the question was much discussed, whether letters addressed to a person whose sanity was in issue, were admissible to prove that he was *treated as insane* by the writers of the letters; and after undergoing several investigations before the Court of Kings Bench and Exchequer Chamber, it was finally decided by a large majority of the House of Lords, that such letters were inadmissible, unless connected by proof with some act of the person implicated, in regard to the letters themselves, or their contents.

8. The sixth error alleged in the motion for a new trial is, because the Judge failed to include in his charge to the Jury, the Law on all material facts proven in the evidence, and insisted on in the argument of counsel; and especially in failing to charge the Jury whether the prisoner was or was not responsible for crime, if by reason of the injury to his brain, *or otherwise*, (mark that expression!) he was afflicted with the disease called *Oinomania*, and by reason of this disease, was irresistibly impelled, *by a will not his own*, to drink; and after being so impelled, did drink, and thus became insane from drink, and while thus insane, he committed homicide. The Court also erred in not charging the Jury, that if they believed the prisoner had suffered by injury, *or otherwise*, (mark that again!) a pathological or organic change in the brain, which produced the disease of *Oinomania*, and by this disease was irresistibly impelled to drink liquor, and from the liquor thus drank became insane, and while thus insane, killed deceased, he was not guilty of murder. And

Seventhly, Because the Court erred in charging the Jury, that if prisoner labored under a disease of the brain, which did not render him insane, but notwithstanding the disease, knew right from wrong when sober, and then drank liquor, which produced madness or insanity, and killed deceased, he was not guilty of murder.

Eighthly, Because the Court erred in refusing to charge the Jury, in language or substance, as requested by defendant's counsel, in writing, as follows: "If the Jury believe that prisoner was insane when he left Rome and came to Atlanta, and continued insane until he killed deceased, the fact that he drank liquor in the meantime cannot render him liable, but he must be acquitted of murder.

Ninthly, Because the Court erred in charging the Jury, that insanity produced proximately by drunkenness is no excuse for crime.

Tenthly, Because the Court erred in charging the Jury, that insanity was an excuse, unless such insanity was produced by liquor.

Fifteenthly, Because the Court erred in submitting to the Jury the question of drunkenness, as explanatory of his condition at the time of the homicide; and that the defendant could not protect himself from the responsibility of one crime, when committed during insanity produced by another crime voluntarily assumed. And

Sixteenthly, Because the charge of the Court, as a whole, and in each part, was error, in that it submitted to the Jury questions not made by the issues and the facts, and did not submit to the Jury the questions made by the issues and the facts.

Now, what is substantially the response of Judge Bull to all this? "I will not, gentlemen of the Jury, confuse you or myself, by attempting to notice all these learned distinctions. The simple rule laid down by the Law is, that if a man has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act in question: if he has knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, he is, in the eye of the Law, of sound mind and memory, and, consequently, the subject of punishment. For the Code declares, that a person shall be considered of sound mind who is not an idiot, a lunatic, or affected by insanity; or who

hath arrived at the age of fourteen years, or before that age, *if such person knew the distinction between good and evil.*

"But, though it is the general rule, that insanity is an excuse, yet, there is an exception to this rule, and that is, when the crime is committed by a party in a fit of intoxication, though the party may be as effectually bereft of his reason by drunkenness as by insanity produced by any other cause. For drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, artifice or contrivance of another. Nor does it make any difference, that a man by constitutional infirmity, or by accidental injury to the head or brain, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts in that condition. But if a man is insane when sober, the fact that he increased the insanity, by the superadded excitement of liquor, makes no difference. An insane person is irresponsible, whether drunk or sober."

I pause to remark, how fully does this concluding proposition meet the 8th ground of alleged error in the motion for a new trial, to-wit: That if the Jury believed that Choice was insane when he left Rome and came to Atlanta, and until he killed deceased, then, the fact that he drank liquor in the meantime cannot render him liable, but he must be acquitted of murder. Certainly, responds the Judge; for an insane man is irresponsible, whether drunk or sober!

But to proceed with the charge—"These are the rules for determining the question of insanity, and the degree and nature of irresponsibility to the Law. The Law presumes every man of sound mind till the contrary appears, and the burden of proof is on the defendant, that, at the time of the commission of the act, he was not of sound mind. And it ought to be made to appear to a reasonable certainty, to your reasonable satisfaction, that, at the time of the commission of the act, the party did not know the nature and quality of the act, or, if he did, did not know that the act was wrong; and it devolves upon you to decide whether the defendant has, by proof, rebutted this legal presumption of sanity. If, after mature deliberation, you are satisfied, beyond a doubt, that the prisoner is guilty, you will find so; if not, you will find him not guilty."

Would that I could transcribe this admirable charge entire. For, in our judgment, it submits to the Jury, full and fairly, the Law upon the *only* questions made by the issues and the facts in this case.

Whether any one is born with an irresistible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established! For myself, I capitally doubt whether it ever can be. And if it were, how far this crazy desire for liquor would excuse from crime, it is not for me to say. That this controlling thirst for liquor may be *acquired* by the force of habit, until it becomes a sort of second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immovably, and from it, nothing can dislodge me but an act of the Legislature, namely: that neither moral nor legal responsibility can be avoided in this way. This is a new principle sought to be ingrafted upon criminal jurisprudence. It is neither more nor less than this, that a want of will and conscience to do right, will constitute an excuse for the commission of crime; and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrong-doing. If this doctrine be true—I speak it with all seriousness—the Devil is the most irresponsible being in the Universe. For, from his inveterate hostility to the Author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder, until it is as hard for an Ethiopian to change his skin, as for them to cease to do evil; but the inability of Satan to control his will, to do right, is far beyond theirs; and yet, our faith assures us that the fate of Satan is unalterably and eternally fixed in the prison-house of God's enemies. (The fact is, responsibility depends upon the possession of will—not the power over it.) Nor does the most desperate drunkard lose the power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will whenever he takes his cup. It is for the pleasure of the relief of the draught, that he takes it. His intellect, his appetite, and his will, all work rationally, if not wisely, in his guilty indulgence. And were you to exonerate the ine-

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briate from responsibility, you would do violence both to his consciousness and to his conscience; for he not only feels the self-prompted use of every rational power involved in accountability, but he feels, also, precisely what this new philosophy denies—his solemn and actual wrong-doing, in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity—just compose him, so as to reach his clear, constant experience, and he will confess that he realizes the guilt, and therefore the responsibility of his conduct. A creature made responsible by God, never loses his responsibility, save by some sort of insanity. There have always existed amongst men a variety of cases, wherein the will of the transgressor is universally admitted to have little or no power to dictate a return to virtue. But mankind have never, in any age of the world, exonerated the party from responsibility, except where they were considered to have lost rectitude of intellect by direct mental alienation.

Mr. M. N. Bartlett testified, that prisoner, after one of his sprees, would swear that he would quit drinking. And he stated to Mr. Wilkes, that vicious associations would lead young men to drink; and he thought there was no security when a young man took to his cups. Here was both consciousness and conscience. He did not seek to shield himself from responsibility, because he had lost the power to control his will, any more than David did from the crime of "blood-guiltiness;" because, overpowered by his lust, he had caused the life of Uriah to be sacrificed, in order that he might possess himself of his beautiful wife.

On the trial of Kleim, before Judge Edmonds, of Spiritual Rapping notoriety, in 1845, we find the first clear legal recognition of this *moral* insanity doctrine—a doctrine which destroys all responsibility to human and Divine law; and one originating, as I verily believe, in an utter misconception of man's moral and physical nature; an off-shoot from that Bohon Upas of *Humanism*, which has so pervaded and poisoned the Northern mind of this country, and which, I fear, will cause the glorious sun of our Union to sink soon in the sea of fratricidal blood!

And this is the doctrine which is intended to be covered by the term, "*or otherwise*," twice repeated in the 6th ground of the motion for a new trial; and to which attention was directed by the words in parenthesis, in copying that ground.

Had the Court been requested, in writing, to give charges upon this doctrine favorable to the prisoner, he ought to have declined. For, in the judgment of this Court, no such principle has been recognized in Criminal Law, whatever may be the opinion of medical writers and others upon the subject.

When Choice killed Webb, he was sober, or drunk, or insane. If he was sober, or the homicide was committed in a mere fit of drunkenness, which is no excuse for crime, in either of these events, the offence was confessedly murder. But his defence is, that he was insane. It, then, becomes important to inquire, What was the degree of insanity under which he labored? For the Law, acting upon the assumption, perhaps, that all men are more or less insane, and that it is a question of degree only, has established a standard or test by which Courts are to be governed in the trial of criminal cases.

Judge Bull charged the Jury, that the rule was this: That "if a man has capacity and reason sufficient to enable him to distinguish right and wrong, as to the particular act in question: if he has knowledge and consciousness, that the act he is doing is wrong, and will deserve punishment, he is, in the eye of the Law, of sound mind and memory," and therefore criminally responsible for his acts.

Did he state the rule correctly? This must be decided by authority—to which, I must say, very little reference has been made in the argument—and not by the speculations of Ray and Winslow, Bucknill and Tuke, and other medical writers, however ingenious they may be.

And it is worthy of notice, that a less degree of capacity is required in criminal cases than in civil contracts. It may be an anomaly, still, this difference was distinctly maintained in Bellingham's case, who was tried for the murder of the Hon. Spencer Perceval, in 1812, and was convicted by Lord Erskine, on the trial of Hadfield for shooting at the King in 1800. Indeed, the amount of capacity which would make one responsible for criminal conduct, would stop far short of binding him upon a civil contract.

Lord Hale, in his *Pleas of the Crown*, p. 30, says: "There is a partial insanity, and a total insanity. Some persons that have a competent reason, in respect to some subjects, are yet under a peculiar *dementia* in respect to some particular discourses, subjects or applications; or else it is partial in re-

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aspect to degrees; and this is the condition of every man, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet, are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in committing any offence, for it's matter capital; for doubtless, most persons that are felons of themselves and others, are under a degree of partial insanity when they commit these offences. It is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances, duly to be weighed and considered by the Judge and Jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other, too great an indulgence given to great crimes. Such a person, as laboring under melancholy distempers, hath yet, ordinarily, as great understanding as, ordinarily, a child of fourteen years hath, is such a person as may be guilty of treason or felony."

Arnold was tried, in 1728, (8 *Hargrave's State Trials*, 322,) for shooting at Lord Onslow. In this case, Mr. Justice Tracy laid down the Law to be, "that it is not any kind of frantic humor, or something unaccountable in a man's actions, that points him out to be such a madman, as is exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant—than a brute or a wild beast."

The trial of Hadfield took place in the King's Bench, before Lord Kenyon, in 1800, and is fully reported in 27 *Howell's State Trials*, 1281. Some of the grounds occupied by Lord Erskine, and in which the Court acquiesced, were, substantially:

That it is unnecessary that reason should be entirely subverted or driven from her seat, but that it is sufficient if distraction sits down upon it, along with her, holds her trembling hand upon it, and frightens her from her propriety;

That there is a difference between civil and criminal responsibility; that a man affected by insanity is responsible for his criminal acts, where he is not for his civil;

That a total deprivation of memory and understanding is not requisite to constitute insanity.

In Bellingham's case, to which I have already alluded, and which is reported in 1 *Collinson on Lunacy*, 650, tried in 1812, Lord Mansfield charged the Jury, that "the single

question for them to determine was, whether, when he committed the offence charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong; and that murder was a crime, not only against the law of God, but against the law of his country." The defendant was convicted and executed, notwithstanding he labored under many insane delusions, as the facts in the case show. He determined to assassinate the Premier, that he might thus secure an opportunity of bringing his imaginary grievances before the country, and obtaining a triumph over the Attorney-General. And the test applied in this case, by Lord Mansfield, of the power of distinguishing right from wrong, has ever since been adopted as the only one, to mark the line between sanity and insanity, responsibility and irresponsibility.

Mr. Justice LeBlanc reiterated the test prescribed by Lord Mansfield, in *King vs. Bowler*. (1 *Collinson on Lunacy*, 673.) Lord Lyndhurst did the same thing in the late case of the *King vs. Oxford*. (5 *Carrington and Payne*, 168.) And in the still more recent case of Green Smith, (see statement of the case in *Taylor*, 513,) occurring in 1837, Mr. Justice Parke told the Jury, that, as regards the effect of insanity or responsibility for crime, "it is merely necessary that the party should have sufficient knowledge and reason to discriminate between right and wrong."

With one other citation, I shall conclude this branch of the discussion.

In 1843, took place the trial of McNaughton, for killing Drummond, which excited through England a great degree of interest. Lord Chief Justice Tindal, in this case, instructed the Jury, that, before convicting the prisoner, they must be satisfied that, when committing the criminal act, he had that competent use of his understanding, as that he was doing a wicked and wrong thing; that he was sensible it was a violation of the law of God and man.

This trial occasioned the submitting of certain questions, by the House of Lords, to fifteen Judges, (that being the number, instead of twelve, as formerly,) with a view of eliciting their opinions in regard to criminal responsibility. Those questions and answers were designed to settle the Law of England on this subject.

Question 1: What is the Law respecting alleged crimes,

committed by persons afflicted with insane delusions, with respect to one or more particular subjects or persons; as, for instance, when, at the time of the commission of the alleged crime, the accused knew he was acting contrary to Law, but did the act complained of with the view, and under the influence, of some insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?

Answer: The opinion of the Judges was, that, notwithstanding the party committed a wrong act, while laboring under the idea that he was redressing a supposed grievance or injury, or under the impression of obtaining some public or private benefit, *he was liable to punishment.*

Question 2: What are the proper questions to be submitted to the Jury, when a person alledged to be affected with insane delusions, respecting one or more particular subjects or persons, is charged with the commission of a crime—murder, for example—and insanity is set up as a defence?

Answer: Before a plea of insanity should be allowed, *undoubted* evidence ought to be adduced, that the accused was of diseased mind, and that at the time he committed the act, he was not conscious of right and wrong. Every person was supposed to know what the Law was, and therefore, nothing could justify a wrong act, except it was *clearly* proved, that the party did not know right from wrong.

Question 3: If a person under an insane delusion, as to existing facts, commits an offence, in consequence thereof, is he hereby excused?

Answer: If the delusion were only partial, the party accused was equally liable with a person of sane mind. If the accused killed another in self-defence, he would be entitled to an acquittal; *but if the crime were committed for any supposed injury, he would be liable to the punishment awarded by the laws to his crime.*

The charge of the Court, then, tested by a full review of the English cases, from Lord Hale to the present time, and with which all the best considered American cases agree, is fully sustained. And *Humanitarians* should deliberate maturely, before they lend their aid to break down a rule, which has received the sanction and approbation of the wise and the good for centuries. One other point, and we are done. Was the verdict of the Jury contrary to the evidence?

9. Under the Act of 1853-'54, it is not only the privilege, but made the imperative duty of this Court, to express an opinion upon the testimony in this case, because several of the grounds in the motion for a new trial are, that the verdict was contrary to, and decidedly against the weight of the evidence. I have carefully examined the evidence again, and again, and speaking as it were from the Jury-box, rather than the Bench, I will state succinctly the conclusions at which I have arrived: The proof has utterly failed to establish that, apart from liquor, the accident of 1850 has inflicted any permanent injury upon the brain of the accused.

During the eight years which intervened between the accident of 1850 and the homicide, where was Wm. A. Choice, and what was his manner of life? He was no recluse, but, from his education, social position, and employments, he mingled much in society. He had been a clerk at Milledgeville; and Dr. Gordon, in his testimony, states as a reason why he noticed him while there, was, that he had often heard him spoken of as a man of a high order of talents, and that his prospects were bright for making a star comedian. Having heard such reports often, and also having seen his name favorably spoken of by the Press, he was induced to examine him critically. There were, perhaps, few men, of his age, more generally known.

Where are all his acquaintances—the cloud of witnesses that might have been brought forward to testify to his insanity? Not to distinct facts, these might have been forgotten—but who would state that they had known him for years, that they had repeatedly conversed with him, and heard others converse with him, that apart from the influence of liquor, and when entirely sober, they had noticed in these conversations, that he was incoherent and silly; that, when wholly free from the influence of stimulants, he was wild, irrational, and crazy. Some few, it is true, have spoken, but where are the five hundred who keep back?

On the contrary, you are met at every step in the evidence with such expressions as the following: "Think prisoner was drunk at the time of the difficulty in the Bar Room," "Has known Choice intimately for several years, and considers him a man of promise and talents, but subject to eccentricities—never seen him when he considered him insane—witness thinks him, when drinking, the most dangerous man

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he ever saw." "Has never seen him, only when under the influence of liquor, insane." "Mr. Choice is a very violent man when drinking." "When prisoner threatened to kill witness was three or four years ago. He had been drinking at the time—when under the influence of liquor he is a very violent man."

The proof of insanity, apart from liquor, in this case, is too meagre to raise a reasonable doubt as to the capacity of the accused to commit crime. Who cannot count from one to twenty men, within the circle of their acquaintance, who never suffered any injury upon the head, or elsewhere, and whose rationalty, except when drinking, was never questioned, concerning whom more proof could be adduced to convict them of insanity, than the record in this case furnishes, to prove the insanity of Choice?

It may be, that, owing to the accident of 1850, the defendant was not only more easily affected by liquor, but, also, that he had less power to control his appetite for drink. Still this, if true, would not excuse him. A man may have partial or general insanity, and that, too, from blows upon the head, yet if he drink, and bring on temporary fits of drunkenness, and, while under the influence of spirits, takes life, he is responsible. "There are men," says Mr. Justice Story, "soldiers who have been severely wounded in the head especially, who well know that excess makes them mad; but if such persons willfully deprive themselves of reason, they ought not to be excused for one crime, by the voluntary perpetration of another."—*United States vs. Drew*. 5 *Mason's U. S. Rep* 28.

It is insisted, particularly, that the finding was against the medical testimony in this case; without repeating it, I would state, generally, that the strength of this evidence is greatly overstated in the argument, as the Brief of it will show. As it respects this species of testimony generally, the doctrine is this: It is competent testimony; and where the experience, honesty and impartiality of the witnesses are undeniable, as in this case, the testimony is entitled to great weight, and consideration. Not that it is so authoritative, that the Jury are bound to be governed by it—it is intended to aid and assist the Jury in coming to correct conclusions in the case.

With something short of a hundred more opinions to write

out during the recess, to say nothing of numerous other pressing engagements, we have bestowed upon this case all the time and consideration at our command. And what is the case?

Choice comes down from Rome to Atlanta. He engages in a drunken debauch, as has been the habit and manner of his life. Webb, the deceased, a Constable, serves Bail process upon him for ten dollars—Choice is greatly incensed, and such was the sense of injury which he felt, that he spoke complainingly of Webb's treatment to Branan, when he was brought up from Milledgeville the April afterwards. Mr. Glenn, who happened to be present, interposed his kind offices, and agreeing to pay the debt, the parties separated, while Choice professed to acquiesce in the suggestion of Mr. Glenn, that the officer had done nothing more than his duty. It is clear, that he was still writhing under the indignity, as he felt it to be, that had been offered him. He said to Thos. Gannon, "what do you suppose that damned Bailiff done? He arrested me for ten dollars, and would not take my word for the amount;" and after soliciting a knife, or a pistol, he said he would cut the Bailiff's heart or Dr. Dowsing's—the creditor's—heart. Rising next morning from the carouse of the overnight, he commenced drinking again, and coming up with Webb—who was walking between the Trout House and the Atlanta Hotel toward the Depot—he fires a pistol at him twice, and thus takes his life. The only thing said by deceased, was, "Don't shoot"; and the only words uttered by Choice, were, "Damned if I don't kill you any how." When Webb staggered and fell, Choice started off, saying, "You will take that," or, "Damn you, take that."

In his interview with Mr. Wilkes, in the Callaboose, Choice ascribed his situation to drink, which made him a fool and a madman; but made no allusion to any permanent injury to his brain in 1850. Choice understood himself much better than the intelligent witnesses who testified, and this whole record demonstrates, to my mind, that he was right.

Unless his offence can be excused, or mitigated, by the plea and proof of drunkenness, the verdict of the Jury was fully justified by the facts. The prisoner has had a fair trial. The Law, in the judgment of this Court, has been correctly administered, and when we have said this, our duty is discharged.

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JUDGMENT.

**Whereupon, it is considered and adjudged by the Court,
that the Judgment of the Court below be affirmed.**

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT
MILLEDGEVILLE, NOVEMBER TERM, 1860.

Present—JOSEPH H. LUMPKIN, }
 RICHARD F. LYON, } JUDGES.
 CHARLES J. JENKINS, }

HUGHES *et al.* vs. ALLEN.

John W. Allen, by the tenth item of his Will, directed certain slaves to be manumitted, which clause was declared void. By the twelfth item of his Will, he "desires all the remaining portion of his property, consisting of household and kitchen furniture, crop, provisions, cotton, stock of all kinds, lands, and the following named negroes to be sold, to-wit: Jim, Vinah, Dave, Katy, Aaron, Jerry, Moses, Jim, Mike, and all other property, belonging to me and not heretofore specified, and the proceeds of such sale to be appropriated to the payment of all my debts; and if there should be anything remaining—after all my debts are paid—it shall belong to the children of Theophilus D. Boothe, in the manner specified in the eighth item of this Will." *Held*, That the negroes specified in the tenth item of the testator's Will—the same being void by the Laws of this State—belongs to the heirs at Law of John W. Allen, the testator, and not to the children of Theophilus D. Boothe, as residuary legatees under the twelfth item of the Will.

Trover, in Wilkinson Superior Court. Question brought up by agreement without any decision in the Court below.

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Daniel G. Hughes, as executor of John W. Allen, deceased, brought an action of Trover, in the Superior Court of Wilkinson county, against Willis Allen, administrator of John W. Allen, deceased, to recover damages for the alleged conversion of three hundred dollars in money, and eight negro slaves with their annual hire.

To this action of Trover, the defendant filed a plea of the "general issue" and, also, the following, to-wit:

"That on the 27th day of February, 1856, John W. Allen, then of the county of Twiggs, and State of Georgia, made his last Will and testament, in which, among other things, he undertook to manumit certain slaves, to-wit: Eliza, a woman, about thirty years of age, and her children—Glaucus, a boy, about eleven years of age; Penelope, a girl, about eight years old; Otis, a boy, about five years old, and Sanford, a boy, about seven months old; and gave to said woman, Eliza, her bed and bed clothes, and trunk, and two hundred dollars in cash, and directed his executors to transport her and her children to any place where she might desire to go, and also appropriated a sum of money sufficient to remove them. And in the twelfth item of his said Will, he bequeathed as follows, to-wit: "I desire the remaining portion of my property, consisting of household and kitchen furniture, crop of provisions, cotton, stock of all kinds, land, and the following named negroes to be sold, to-wit: Tom, Lem, Daniel, Dow, Caty, Aaron, Jerry, Moses, Jim, Mike, and all other property belonging to me, not heretofore specified, and the proceeds of such sale to be appropriated to all my debts, and if there should be anything remaining after all my debts, it shall belong to the children of Theophilus D. Boothe, in the manner specified in the eighth item of this Will." And, further, in the thirteenth item of said Will, the said John W. Allen, deceased, declared: "That, if any one, specified in this Will, should attempt to prevent the same from going into execution and distribution, as specified in these several items, then such an one shall not receive his distributive share, so apportioned, but the same shall be a common dividend to the others who have been mentioned in the same." For the better consideration of this plea, this defendant sets out a copy of the Will, which is as follows, to-wit:

"In the name of God, Amen. I, John W. Allen, of the county of Twiggs, and State of Georgia, being of sound and

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disposing mind and memory, and being desirous to settle my worldly affairs while I have strength to do so, do make this my last Will and testament, hereby revoking all wills by me heretofore made. And first, I commit my soul to God, Who gave it, and my body I desire to be buried in the family burial ground at Cool Spring Church, in Wilkinson county, and my worldly estate, I dispose of, as follows:

“First. I desire and direct that my plantation shall be kept in operation for the present year, together with all my stock and farming tools, &c.; after the expiration of which time, I desire that all my just debts be paid, without delay, to my creditors, by my executors, hereinafter mentioned, as there is no cause for further delay in payment of the same.

“Second. I give and devise to my beloved brother, William Allen, the following negroes, to-wit: Red, a man forty-two years old; Gracy, a woman about thirty years old; George, a boy about eleven years old; Louisa, a girl about three and a-half years old; Jane, a girl about two years old; Amy, a child about two months old.

“Third. I give and devise to my beloved brother, Willis Allen, the following negroes, to-wit: Big Jerry, a man about thirty-one years old; Cato, a boy about twenty years old, and the following land, to-wit: The settlement known as the Paget place; the settlement known as the Mrs. Rouse place, and one hundred acres of lot No. 72, making, in all, about three hundred and fifty acres.

“Fourth. I give and devise to Miss Sarah Bryan two hundred dollars in cash.

“Fifth. I give and devise to my beloved uncle, John Rogers, one thousand dollars in cash.

“Sixth. I give and devise to my beloved sister, Polly Meridith, wife of Wyatt Meridith, five dollars in cash.

“Seventh. I give and devise to John McCullers, whose name was changed by the Legislature of this State to John Allen, five dollars in cash.

“Eighth. I give to the children of my worthy friend, Theophilus D. Booth, in trust, the following negroes, to-wit: Sarah, a woman about thirty years old: her son Henry, about thirteen years old; Georgia Anna, a girl about eleven years old; Andrew, a boy about five years old; Billy, a boy about nine years old; Ellen, a girl about six years old; Clifford, a girl about three years old; and if any of the children

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of the above-mentioned Theophilus D. Booth shall die, leaving no child, the offspring of his or her body, then his or her distributive share to be equally divided among the remaining brothers and sisters of such child; and I hereby appoint my worthy friend, James R. Coombs, trustee for said children and said property. Also, the following negroes, to-wit: I give, in the manner above-mentioned, in the above clause. Jack, a boy about twenty years old; Zadock, a boy eighteen years old; Josephine, a girl about sixteen years old; Luke, a boy about five years old; Tom, a boy about thirteen years old; Rachael, a girl about eleven years old; David Crockett, a boy about two years old: all the above-mentioned negroes, together with the increase of the females, being given to said Theophilus D. Booth's children for their sole and separate use, and not subject to the debts of any person whatsoever.

"Ninth. I give unto the children of my worthy friend Daniel G. Hughes, in trust, the following negroes, to-wit: Ann, a woman about twenty-six years old, and her children; Allen, about six years old, as well as the increase of Ann; said negroes not to be subject to the debts of any person whatsoever; and I hereby appoint Daniel G. Hughes trustee for said children and said property.

"Tenth. I hereby manumit and forever release from involuntary servitude the following slaves, to-wit: Eliza, a woman about thirty-five years old; Penelope, a girl about eight years old; Otis, a boy about five years old; Sanford, a boy about seven months old; allowing her to keep her bed and bed-clothes, and trunk, which are strictly hers; and I do, moreover, give to her, for her use, two hundred dollars in cash, and appropriate a sum of money sufficient from my estate to be used by my executors, hereinafter named, to carry or transport her to any place wheresoever she may wish to go, together with her children.

"Eleventh. I give the following negroes, in trust, to Mary C. Booth: Polly, a girl about thirteen years old; Sylvia, a woman about fifty years old; Peter, a boy about ten years: as also the increase of the females mentioned in this item: said negroes to be the sole and separate property, and for the sole and separate use, of the said Mary C. Booth, and not subject to the debts of any future husband or other person whatsoever; and if the said Mary C. Booth should die, leaving no child, then said negroes shall be equally divided be-

tween her brothers and sisters; and I do hereby appoint my worthy friend, James R. Coombs, trustee for said Mary C. Booth.

"Twelfth. I desire the remaining portion of my property, consisting of household and kitchen furniture, crop of provisions, cotton, stock of all kinds, land, &c., and the following named negroes to be sold, to-wit: Levi, Daniel, Tom, Caty, Aaron, Jerry, Moses, Jim, Mike, *and all other property belonging to me not heretofore specified*, and the proceeds of such sale to be appropriated to the payment of all my debts, and if there should be anything remaining after all my debts are paid, it shall belong to the children of Theophilus D. Booth, in the manner specified in the eighth item of this will.

"Thirteenth. If any one specified in this will should attempt to prevent the same from going into execution and distribution, as specified by these several items, then such an one shall not receive his distributive share, so apportioned, but the same shall be a common dividend to the others who have been mentioned in the same.

"Fourteenth. I desire that my faithful old servant, Pleasant, shall go where she pleases, and that she shall not belong to any one, and that the sum of one hundred dollars shall be reserved for her use and support.

"Fifteenth. I give and devise unto Daniel G. Hughes my watch, to be his forever.

"Sixteenth. I constitute and appoint my beloved friends, James R. Coombs and Daniel G. Hughes, executors of this my last will and testament."

The said John W. Allen having died, his said Will was duly presented to the Ordinary of said county of Twiggs, and, being duly proven, was ordered to be recorded by the judgment of said Ordinary, except so much and such parts thereof as related to the manumission of the slaves as heretofore set forth; and in relation to said negro slaves so attempted to be manumitted as herein specified and set forth, an intestacy was declared by a like judgment of the Ordinary aforesaid; and administration was taken out by the defendants in this suit, for the settlement of the estate of the said John W. Allen, not disposed of in and by his said Will, including the slaves so attempted to be manumitted as aforesaid, which slaves were, by said defendant, taken into possession, and sold by an order of the Ordinary aforesaid, and the proceeds

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distributed to the heirs at Law of the said John W. Allen, in due course of administration. Afterwards, the plaintiff claiming the same, in behalf of the residuary legatees under the Will aforesaid of the said John W. Allen, more particularly under the 12th item hereinbefore stated, instituted said action of Trover (to which this plea is now filed) against the defendant to recover the said negroes so attempted to be manumitted as hereinbefore stated, with their issue. Now this defendant, for plea to said action, (the premises considered,) denies that the plaintiff, in behalf of said residuary legatees under said Will, have any right, title or claim to the said negro slaves and their issue, but, on the contrary, in fact, says, that as to all of said slaves, the said John W. Allen, upon any true construction of said Will, died intestate; and said slaves, with their increase, and all money and property in said will given to effect their manumission, rightfully descended, and belongs to the heirs at Law of the said John W. Allen, deceased; all of which facts this defendant is ready to verify. Wherefore, he prays, &c.

To this plea the plaintiff demurred, and the parties agreed that all the facts were correctly set forth in the plea, with this addition, to-wit: "That all the orders for letters of administration, order for sale, and the sale of the property by the administrator, as stated in the plea, were granted, and took place whilst the validity of said Will was in litigation, and pending, and undetermined in the Courts of Georgia." The parties further agreed, in writing, that as His Honor Iverson L. Harris has been so connected, professionally, with the question involved, as to render him unwilling to hear and determine it, that said question, to-wit: Whether, by said Will of the said John W. Allen, the said negroes and other property mentioned in the tenth item of said Will, having failed to pass by virtue of said tenth item, go to the next of kin of the deceased, or go to the children of Theophilus D. Booth, as residuary legatees, by virtue of said Will, shall go and be carried up to the next Supreme Court, at its November Term, 1860, at Milledgeville, as a case made to by said Court heard on argument, and then and there, by said Supreme Court, finally decided and determined.

Thus this case comes before the Court for its adjudication.

BAILEY & DEGRAFFENREID, for plaintiff in error.

E. A. & J. A. NISBET, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

The tenth item of John Allen's Will, manumitting certain slaves therein named, having been declared void, the only question in this case is, whether the said slaves therein specified go to Booth's children, as residuary legatees under the twelfth item of the Will, or to the heirs at Law of the testator?

In the main, we fully recognize the positions assumed by counsel for the residuary legatees—fortified, as they are, by approved English and American authorities, and enforced, as they have been, in the argument before this Court, with signal ability. The following propositions we hold to be true: That when the general legatee is residuary legatee, he is entitled, not only to what remains after the payment of debts and legacies, but also to whatever may, by lapse, invalid disposition, or other casualty, fall into the residue after the date and making of the will. *Roper on Legacies*, 1673; 1 *Ves. Sen.* 320; *Russel & M.* 255. That a residuary clause passes a lapsed legacy, and that which is intended to be the subject of bounty to another. And this rule laid down by Lord Collinham, (*Roper*, 1682,) is founded upon the idea, not that it effects, in specie, what the testator intended, but because the residuary clause is understood to be intended to embrace anything, not otherwise effectually given. Because, as Sir Wm. Grant expresses it, the testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee, or, as it is sometimes expressed, the particular intent of the testator is made to give way to the general intent, to effectuate the plain purpose of the testator—not to die intestate as to anything belonging to him.

In *Kennel vs. Abbott*, (4 *Ves.* 303,) a legacy lapsed. The residuary clause was: "And as to the residuum of the purchase money arising from the sale of my copy-hold estates, household goods and furniture, and all the rest, residue and remainder of moneys, sureties for money, personal estate and effects, whatsoever and wheresoever, that I should die possessed of, interested in or entitled to, or which I have power to dispose of, by will, I give to Billy Kennel, subject to his debts and funeral expenses." It was held that this

clause carried a lapsed legacy. The same point was held in *Brown vs. Higgs*, (*ibid*, 1708.)

In *Cambridge vs. Bass*, (8 vs. 12,) the testator gave and bequeathed all the rest and residue of his property and effects whatever, in money or the public funds, or other securities of any sort or kind, whatsoever, to be divided," &c. This clause was held to pass a lapsed legacy.

In *Bland vs. Lamb*, (*Walker's Rep.*, 399,) the testator, after disposing of his large estate by Will, closed by saying: "Anything I have forgot, I leave at the disposal of Mrs. Bland, of Isleworth. All my wines are hers." In a codicil, he added: "I may have forgotten many things, such as money due me from Government; and if such there is, it is to be thrown into a lump, for the benefit of the legatees, to be paid to them in proportion." After this, two days from the date of the codicil, testator died, and also his aunt Bland a few hours after, who left him, by her Will, over \$100,000. The suit was to have this distributed, under the residuary clause of his will, as "things forgot," when it was notorious he could not have forgotten it, for it did not belong to him at the time of his death. Hence, counsel argued that testator could have had no intention to include it in the residuary clause. But the Vice-Chancellor, and afterwards the Chancellor, on appeal, decided that it passed, under the residuary clause; that it takes very special words, to take any residue out of the residuary clause of a Will; that particular intention is not to govern.

The same doctrine is maintained in *Boggs vs. Morgan*, 16 *Cond. Eng. Eq. Reports*, 289, and in *Dawson vs. Gascon*, 15 *id.*, 14 and 2 *Keene*; and the American Courts have followed these authorities. *Breslanport vs. Beauskett*, 1 *Richardson Eq. Rep.*, 465; *Taylor vs. Lucas*, 4 *Hawkes*, 215; *Banks vs. Phelan*, 4 *Barbour, Supreme Court Reports*, 80; *King vs. Woodhul*, 3 *Ed. Ch. Rep.*, 79; 6 *Paige's Rep.*, 600, and 18 *Geo. Rep.*, 139.

These are the leading cases cited by counsel for the plaintiffs in error; and the principle deduced from them is: That true, Allen, by his Will, manifests a clear intention to dispose of all his property; that this intent would have been effectuated, had it been legal to manumit slaves; but that this particular intent to give a portion of his slaves freedom, having failed, and they falling into the general estate, and not

being wanted to pay debts, became subject to the residuary clause, as "things remaining," and go to Booth's children. While we have no controversy with the authorities produced, nor with the general reasoning based upon them, we cannot subscribe to the conclusion to which counsel come. We think an important exception has been overlooked, and which must settle this case. It is this: That a testator may, by the terms of the bequest, so narrow the title of the residuary legatees as to exclude them from lapsed and void legacies; and that the testator has, in this case, so excluded the children of Booth.

We apprehend this general principle will not be controverted. *Williams on Ex'rs*, 1043; 3 *P. Williams*, 40; *Ambley*, 577; 5 *Ves.*, 149; 12 *Ves.* 497; 2 *Rop. on Leg.*, 3 *Ed.*, 587; *Williams on Ex'rs*, 1045; *Toller*, 343; 1 *P. Williams*, 302; 2 *Rop. on Leg.*, 3 *Ed.* 589; 1 *Dev. & Batt.*, 492; 18 *Ga. Rep.* 130; 5 *Hare*, 250, (*Pendleton vs. Blount*,) 5 *M. & Cr.*, 62.

By reference to the twelfth item of Mr. Allen's Will, it will be seen that he expressly excludes from the residuum property belonging to him and *theretofore specified* in his Will. The slaves in dispute, and included in the tenth item of the will, are clearly excluded from the residuum; and we have searched carefully for any case, either cited by counsel or in the libraries, and we can find none which meets this case. In many of the wills whose clauses I have copied, they might seem the same upon a casual inspection; but the difference is fundamental. A testator might say, "all the rest of my property not heretofore disposed of," &c., and a void bequest would pass under it. And why? Because an ineffectual disposition is no disposition. But the term, "not heretofore *specified*," is a term of identification only, and applies as well to a lapsed or void legacy as to a valid one; and that is this case: and we repeat, we can find no parallel to it. Certainly, counsel have furnished none.

Believing that the rule has been stretched quite far enough in this direction, we are not disposed to make a precedent—extending it one step further.

Consequently, our judgment is, that the property specified in the tenth item of testator's Will, belongs to the heirs at Law of John W. Allen, and not to the children of Theophilus D. Allen, as residuary legatees, under the twelfth item of testator's Will.

Hadley vs. Ellis.

JUDGMENT.

Whereupon, It is so adjudged that the negroes *specified* in the emancipation clause of the testator's will, do not fall into the residuum under the twelfth item of the will, but vest in the heirs at Law.

HADLEY vs. ELLIS.

When the Law has been substantially administered, and the evidence is doubtful, to say the most of it, the verdict of the Jury will not be disturbed.

Assumpsit, in Thomas Superior Court. Tried before Judge HARRIS, at the June Term, 1860.

James T. Ellis instituted an action of Assumpsit in Thomas Superior Court, against Simon D. Hadley, to recover the price of a horse, which Ellis alleged he had sold and delivered to Hadley.

Hadley filed to said action the pleas of the "general issue" — "rescission of the contract," and "failure of consideration."

On the trial of the case, the following evidence was adduced, to-wit:

Dr. BOWER testified: That, as the agent of Ellis, he sold to Hadley a horse, at the price of one hundred and seventy-five dollars; that he was Ellis' agent to sell, but did not think he had any authority to take the horse back; that Hadley said he wanted a gentle horse, and, after trying the horse in a buggy, he agreed to take him, and promised to give him note for the amount on the next day; that Hadley afterwards brought the horse back and said he was not gentle and that he would not drive him for him, and offered him back; that witness told him he was not authorized to take

the horse back, but told Hadley to keep the horse until Dr. Ellis returned; that Hadley did keep him a few days and returned with him again, and witness told him he might turn the horse in witness' lot; that witness did thus receive the horse back; that witness was authorized to receive pay for the horse, and Ellis had not revoked any of witness' power before the horse was received back; that witness was authorized to sell the horse generally, and restricted as to the price only; that the sale to Hadley was not conditional, nor was there any warranty of the horse; that he did not receive the horse back, but allowed Hadley to turn him in witness' lot; that he refused to receive the horse back, because he thought he had no authority to do so.

JAMES L. WALCOTT testified: That whilst Hadley had the horse, witness learning that Bower was Ellis' agent to sell, witness proposed to buy him; that Bower replied, that Hadley had him on trial, and that he could not sell him, until Hadley was done with him; that he does not know the date of the conversation, but it was some two years or more ago.

S. A. SMITH, jr., testified: That a short time after the horse was returned, he heard an excited conversation between Bower and Hadley, in which Hadley asked Bower if he did receive the horse back; to which Bower replied that he did.

W. F. HUBERT testified: That the horse died about the third day after he got him, and that he recommended the horse as gentle.

Upon this evidence, the Jury returned a verdict in favor of the plaintiff for one hundred and seventy dollars, principal, with interest from the 1st day of January, 1858.

Counsel for Hadley then moved for a new trial, on the following grounds, to-wit:

- 1st. Because the verdict is contrary to Law.
- 2d. Because the verdict is contrary to evidence.
- 3d. Because the verdict is decidedly and strongly against the weight of evidence in the case.
- 4th. Because the Court charged the Jury, "that there was but one question for them to consider, and that was, whether the contract was conditional;" when there was another question made and argued by counsel for defendant, and involved in the case, to-wit: whether the contract was rescinded.
- 5th. Because the Court said to the Jury, "it is admitted that the contract of sale was made."

The presiding Judge refused the new trial, and that refusal is the error assigned.

McINTYRE & YOUNG, for plaintiff in error.

E. L. HINES, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

If the presiding Judge had granted a new trial in this case, we should have affirmed his judgment. In denying the motion, he has not, in our opinion, been guilty of such a flagrant abuse of his discretion as to compel us to remand the cause for a rehearing.

The testimony, fairly considered, is not necessarily conflicting. It amounts to this: After a partial trial of the horse, Mr. Hadley agreed to purchase him at the price stipulated, and took him home. Upon further trial, he became dissatisfied, and offered to return the horse. Dr. Bower, acting as the agent of Ellis, refused to take him back, but advised Mr. Hadley to keep him until Ellis came, which would be in a few days, disclaiming having any authority to rescind the trade himself. Ellis again comes back with the horse, and, by permission of Dr. Bower, turns him into his lot. It seems to be pretty clear, that neither party looked upon this as a rescission of the contract. Bower testifies positively, that the sale was absolute, and that it was not annulled.

This being the proof, and there being no warranty either as to the soundness or quality of the horse, however hard the bargain may be—as it doubtless is—we cannot relieve the buyer against the consequences of his own haste, confidence or carelessness.

JUDGMENT.

Whereupon, It is considered and adjudged by the Court that the Judgment of the Court below be affirmed.

DOYLE vs. LYONS.

There being an action at Law, pending on the appeal, and a bill in Equity, filed by the defendant at Law, against the plaintiff, seeking relief, touching the same subject matter, and a consent in writing, by the parties, that both cases be tried at the same time, the complainant, at a Term of the Court when the cases stood for trial, amended his bill, and asked an injunction of the action at Law, until the coming in of the plaintiff's answer to the amended bill, whilst the plaintiff at Law insisted upon a trial. The presiding Judge, in his discretion, ordered a verdict to be taken, and judgment entered, in the action at Law, and that further proceeding, under that judgment, be enjoined, until the coming in of the answer to the amended bill, and the further order of the Court; and judgment was accordingly entered during the term in the action at Law. Under such circumstances, this Court will not partially disturb the discretion of the Court below, by reversing so much of its judgment as imposes the injunction.

In Equity, in Thomas Superior Court. Decision made by Judge HARRIS, at the June Term, 1860.

The record in this case discloses the following state of facts, to-wit:

John P. Lyons exhibited his bill in Equity, in Thomas Superior Court, against Francis W. A. Doyle, in which it is alleged: That the complainant, desiring to purchase lot of land No. 78, in the 13th district of originally Erwin, then Thomas county, called on the defendant, who represented himself to be the true and legal owner of the land, and that he was able to make a good, valid and unincumbered title to the same; that upon the faith of such representations, the complainant bargained with the defendant for said land at the price of fifteen hundred dollars, for which he gave to the said defendant his promissory note, dated the 21st day of November, 1855, and due the 1st day of January, 1857, with interest from date, if the whole amount should not be punctually paid, and took from the said defendant his bond, dated the same as the note, and conditioned to make to the complainant "good and sufficient titles in fee-simple to and for said land," when the complainant should well and truly pay the said promissory note; that some time in the year 1856, the land was levied on as the property of one Henry Petty, by virtue of a *fi. fa.* from Muscogee Inferior Court, in favor of James C. Watson vs. Henry Petty, and under the levy,

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the land was sold by the Sheriff of Thomas county, and purchased, at the sale, by one Hansell R. Seward; that complainant, for want of legal title, could not interpose a claim to the land, and therefore notified the defendant of the levy and advertisement of the land, and requested him to interpose a claim, which said defendant declined; that complainant having no legal title, could not take actual possession of the lot; and the defendant declining either to claim it or enter upon it, the said Seward claimed to hold the possession of the land, and refused to give it up; that complainant notified the defendant of these facts, and proposed to pay off the note, if the defendant would make him a good title, and deliver to him the actual possession, or extinguish Seward's claim thereto; all of which the defendant declined to do, but required complainant to pay the sum due on the note, and assumed the burden of litigation against the title of Seward; that complainant has always been, and is still, ready and willing to pay the note, if defendant will make him an unincumbered title; that early in the year 1857, defendant called upon complainant and proposed to make him titles to the land, and his muniments of title were submitted to the Hon. James L. Seward, who pronounced the chain of title imperfect, for the want of a link to make it complete; that defendant was never, and is not now, able to make a perfect title to the land, not having a perfect chain himself; that the defendant is wholly insolvent, and unable to respond in damages for any breach of said bond for titles, or for any breach of the covenants of the deed he might make; that there are judgments against said defendant to which said land is subject, and if the complainant were to pay off said note, he would be without remedy; that suit is now pending, in Thomas Superior Court, on said note, in favor of defendant against the complainant, which is now on the appeal, and will be prosecuted to judgment and execution, and the money collected, unless the said suit is enjoined.

The complainant, by his bill, prays—1st, The defendant's answer to the charges of the bill; 2d, That the suit on the note may be enjoined; and 3d, For general relief.

The defendant filed his answer to the bill, in which he admits:

That he represented himself to be the owner of said land, sold the same, gave the bond, and took the note charged

the bill, and in the manner, and at the time stated therein; that his title was, and is, as follows: 1st, The grant from the State of Georgia to Dennis Doyle, now deceased, who was defendant's father; 2d, A written agreement and relinquishment made by Mary Doyle, the executrix of Dennis Doyle, deceased, to the defendant and Albert A. Blakely, trustee for his wife, Georgianna Blakely; 3d, A deed to two-thirds interest in said lot of land made by Albert A. Blakely as trustee, as aforesaid, to the defendant, which deed is also signed by Georgianna T. Blakely, the *cestuy que trust*, and another deed for the same interest, made pursuant to a decree in Equity rendered in the Superior Court of Spalding county; 4th, A deed from Benjamin B. Doyle, one of the heirs of the said Dennis Doyle, deceased, to Albert A. Blakely, as trustee as aforesaid, conveying all his interest in said land; 5th, A properly authenticated copy of the last will and testament of the said Dennis Doyle, deceased, duly proven and recorded; that upon the strength of these muniments of title, he did assert, and now asserts, himself the true, legal and only lawful owner of said lot of land, and able to make a good and perfect title to the same; that all these evidences of title are in the hands of his attorneys, Messrs. Burch and McLendon, of Thomasville, Georgia; that defendant was ready, able and willing before the maturity of said note, and is now ready, able and willing to make a title, according to the terms of his said bond, when the complainant pays said note, given for the purchase price of said land; that the complainant did, in the year 1856, inform the defendant that said land was levied on, as charged in the bill, but does not recollect any request for the defendant to interpose a claim, but, on the contrary, the request was, to cancel the trade by giving up the bond on the one hand, and the note on the other: which proposition the defendant declined; the defendant admits that he did not interpose a claim to the land when levied on, but desired complainant to do so under the said bond for titles; the defendant is informed, and believes it true, that public notice was given at said sale, by the Hon. Augustus H. Hansell, as counsel of complainant, that the title to said land was in the defendant, from whom complainant had bought it, and had a bond for titles, and that Seward bid off the land at the sum of fifty dollars, and this defendant asserts that said Seward obtained no title by

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his purchase at said sale; that said land, from the time complainant bought it, up to now, was, and is still, unoccupied, and there has been, and still is, nothing to hinder the complainant from entering upon and occupying it, and if he has failed to do so, it is, and has been, his own fault, and not the fault of the defendant; the defendant admits that the complainant met him in Thomasville, and told him that Seward held a Sheriff's deed to the land under the sale aforesaid, and proposed to pay the sum due on said note, if the defendant would take up or extinguish Seward's claim, which this defendant agreed to do, and he had no sooner agreed to do so, than complainant backed out, and receded from his own proposition, and excused himself by saying that he could not raise the money; that this defendant agreed to said proposition as a compromise only, and does not, of course, now feel bound by it; afterwards, the defendant did refuse to agree to the same proposition; the defendant admits, that after all that had passed between the parties, he did decline doing anything, except to comply with his bond upon the payment of said note; the defendant never did offer or propose to pay the sum due on said note, except upon conditions outside of the contract; the defendant denies utterly the charge of insolvency made in complainant's bill, and asserts that he has ample and abundant means to meet any and all of his liabilities of every character; that there are but two judgments or executions in the world against him: one for taxes, not exceeding twenty dollars, and the other not fifteen dollars, for cost against him as attorney for a non-resident client, both of which he is abundantly able to pay, and expects to pay, in a few days; the defendant admits the pendency of a suit on the note, and his purpose to press the collection of the principal and interest of the note, as in the bill alleged, believing it to be his unquestionable right.

On the 31st of May, 1858, the defendant amended the foregoing answer, by a statement that he had paid off the two *fi. fas* against him since the filing of his answer, and asserting there was then no judgment against him.

Upon the coming in of the amended answer, a motion was made to dissolve the injunction prayed for in the bill, and which had been granted by the Chancellor.

This motion was heard, on the 18th of January, 1859, before His Honor Judge Love, who passed an order dissolving

the injunction, "on the ground that the Equity in the bill was fully sworn off, and further adjudging that the plaintiff in the Common Law action have leave to proceed to trial."

At the June Term, 1859, both the Common Law and the Equity cases were tried together by agreement of counsel, and the Jury returned the following verdict, to-wit:

"We, the Jury, decree that the plaintiff pay the defendant fifteen hundred dollars, with interest from the 1st day of January, 1857, and that the defendant make a good and unincumbered title to the land in question, and pay all Court cost, and also all cost that may arise on his warranty to plaintiff in the future."

Counsel for plaintiff then made a motion for a new trial, in which a brief of the evidence was agreed on, and in which brief it was admitted that "the bill, answers, note, bond and evidences of title referred to in the pleadings were all read in evidence, and that the land was sold as stated, but that the purchaser did not take possession, and that the land was still vacant. The motion was predicated on the following grounds, to-wit:

1st. Because the verdict is against Law.

2d. Because the verdict is against the charge of the Court.

3d. Because the verdict is strongly and decidedly against the evidence.

4th. Because the verdict is without evidence.

His Honor Judge Love, who was then presiding, allowed the motion, and granted a new trial on all the grounds taken in the rule.

On the 21st day of June, 1860, the complainant amended his bill, by alleging: That in all he said and did in and about the lot of land mentioned in the bill, was done under a mistake as to the land he wanted, and supposed he was buying; that he desired to purchase the lot of land lying about two miles south or south-east of Thomasville on the Monticello road, and was informed that the said Doyle was the owner thereof; that believing him to be such owner, and believing that he was buying said lot of land, he gave the note and took the bond for titles mentioned in the bill; that but for this impression, he would not have made the trade; that he had never seen lot No. 78, and did not know anything of its value, and did not want to buy it; that he did not find out the mistake until some time afterwards, when he offered the

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land for sale, which he supposed he had bought; that lot No. 78 is of little or no value, not being worth more than two or three hundred dollars; that he is advised that to make a valid contract, the parties to the contract should agree, in mind, as to the subject matter of the contract, and he insists that it would be inequitable to compel him to pay fifteen hundred dollars for a piece of property not worth more than two hundred or three hundred dollars, which he did not want, and which he bought under a mistake as to its identity.

Complainant also amended the prayer of the bill, so as to ask for a rescission of the contract, and a perpetual injunction of the Common Law action.

Upon the coming in of the amendment to the bill, counsel for complainant moved to revive the injunction which had been previously dissolved.

This motion was resisted by counsel for the defendant, Doyle, and after argument had, His Honor Judge Harris then presiding, passed the following order:

"The complainant having amended his bill at this Term of the Court, it is, in consequence thereof, ordered that the plainiff at Law be enjoined, after he shall have taken his verdict on the note sued on, given for the land, from issuing execution on the judgment to be entered on said verdict, until the amendment of complainant's bill shall have been answered and the Equity case tried. Having permitted Doyle, the plaintiff at Law, to take a verdict at Law on the note of defendant, so as to give him a lien on the property of defendant only, the injunction in behalf of complainant in this cause is renewed solely to prevent complainant from being prejudiced by the verdict at Law, until the matters in controversy between the parties in Equity shall have been heard and determined at the next Term of this Court, 22d June 1860."

The renewal of the injunction constitutes the error complained of in this case.

R. S. BURCH, for the plaintiff in error.

J. R. ALEXANDER; McINTYRE & YOUNG, for defendant in error.



By the Court.—JENKINS, J., delivering the opinion.

This case is somewhat peculiar, and must be decided upon its own distinctive features. Doyle, the plaintiff in error, commenced his Common Law action in the Superior Court of Thomas county, against the defendant, John P. Lyons, on a promissory note. Pending the action, the defendant, Lyons, filed in the same Court a bill in Equity, setting up certain equitable defences against the recovery of the amount of the note, averring that he was remediless at Law, and praying injunction of the Common Law action, and relief under the bill. The injunction was granted. Doyle answered the bill, and moved a dissolution of the injunction, which was ordered. The Common Law action then being on the appeal, was in order for trial. The counsel for plaintiff and defendant entered into the following consent, in writing, which appears in the record, viz :

F. W. A. Doyle) Debt, in Thomas Superior Court, on Ap-
 vs.)
 John P. Lyons.) peal. January Term, 1857.

It is agreed by counsel on both sides, that upon the trial of the case, the bill filed by defendant to enjoin it, and for discovery and relief, be tried at the same time with it.

(Signed.)

BURCH & McLENDON, plaintiff's Attorneys.

AUGUSTUS W. HANSELL, defendant's Attorneys.

The parties went to trial, carrying both causes before a special Jury, who rendered a verdict. The defendant in the Common Law action (Lyons) being dissatisfied with the verdict, moved for a new trial, on several grounds, and a new trial was ordered. At the June Term, 1860, of the same Court, Lyons (defendant at Law) amended his bill in Equity, setting forth a new ground of equitable defence against the note, and moved for an injunction of the Common Law action. The presiding Judge ordered an injunction, after the plaintiff shall have taken a verdict, for the amount of the note, in the Common Law action, until the defendant in Equity shall have answered the amended bill, thereby securing to the plaintiff at Law a lien upon the defendant's property, and, at the same time, affording the latter an opportunity to assert his equities. This mode of procedure seems to have been devised in the discretion of the presiding Judge, overlooking or treating as irregular the consent of

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parties, to try both cases on one issue. The verdict in the Common Law action was accordingly taken, and that has not been excepted to, or in any way impugned. But the plaintiff (Doyle) excepts to the order of the Court, enjoining further proceeding in the Common Law action, after having obtained his judgment on the note. We see no reason why the consent to try both actions together is not as applicable to the cases after new trial granted as before, and we have known practice to sustain such a consent. Inasmuch, then, as the discretion exercised by the presiding Judge has deprived the defendant at Law of the benefit of this consent, and would injuriously subject him to the payment of the money for which judgment has gone against him at Law, in advance of an answer to his amended bill, without passing upon the merits of the amendment, we affirm the Judgment.

JUDGMENT.

Whereupon, It is considered and adjudged (without passing upon the merits of the last amendments to the bill in Equity) by the Court below, that the Judgment of the Court below be affirmed, on the ground that the injunction granted in the Court below was part and parcel of the direction given by order of that Court to the cases pending at Law and in Equity between the parties, and that the dissolution of it, leaving the remainder of the order of force, would do manifest injustice to the complainant.

BALLARD vs. BANCROFT—BALLARD vs. BANCROFT & WATTERS.

1. On a motion to the Court to dismiss an action at Law, because no process had been annexed to the original petition, and none appearing by inspection of the petition, the Clerk, whose duty it was to annex the process, is an incompetent witness to prove that, that duty had been performed.
2. Writing and signing a process on a separate paper from that on which the original petition is extended, and then placing the paper, containing the process, loosely within the folds of the petition, is not a compliance with that provision of the Judiciary Act of 1799, which requires that process shall be "annexed" to the petition. The process must be extended on the same paper on which the petition is written, or if on a different paper, the two must be firmly united by wax or tape, or in some other secure method.
3. The delivery of a copy of the process, with a copy of the petition to the defendant, is essential to perfect service, and to give the Court jurisdiction of the case.

Motion to dismiss actions, in Jasper Superior Court. Decided by Judge HARRIS, at the April Term, 1860.

These two cases involved the same questions, and were consolidated, and heard together, by consent.

Two actions of Assumpsit were pending in Jasper Superior Court, against William A. Ballard; one in favor of Dyer C. Bancroft, and the other in favor of Dyer C. Bancroft and Andrew J. Watters, Executors of John C. Watters, deceased.

When these cases were called in their order, counsel for the defendant moved to dismiss them, on the ground that, the Clerk had failed to annex original processes to the original petitions, or copy processes to the copy petitions which were served on the defendant.

Upon an inspection of the original petitions, the Court held, that they contained no evidence that original processes had been annexed to them by the Clerk, or that such original processes had been waived by the defendant.

Counsel for the plaintiffs, then proposed to prove by C. E. F. W. Campbell, "that he was the Clerk of Jasper Superior Court at the time the original petitions were filed in the office, and that, to the best of his recollection, he filled up and signed as Clerk, printed processes in the usual form, and

laid them loose in the original petitions, without attaching or annexing them to the petitions, and that he does not know where said processes now are."

To this testimony, counsel for defendant objected, on the ground that the witness being interested, was an incompetent witness to prove the facts.

The Court over-ruled the objection, and admitted the testimony, to which the defendant excepted.

Counsel for the plaintiffs, then introduced the defendant to prove, "that copy processes were annexed to the copy petitions which were served on him by the Sheriff."

Defendant's counsel moved the Court to direct an issue to be made upon these facts, and that the issue be tried by a Jury, which motion was refused by the Court, and defendant excepted.

The defendant was then introduced, and testified before the presiding Judge, as follows: That he was served with copies of the petitions about the time stated in the return by the Deputy Sheriff, but neither of the copies had any copy process annexed, or attached to them: that copies, if not lost, are now at his house, some forty miles distant; that if the cases can be continued until the next term, he will cheerfully produce, or if they can be postponed for the present, he will go for the copies at once.

Counsel for defendant moved to postpone, or continue the cases a sufficient time to enable the defendant to produce the copies which he had forgotten to bring with him.

The Court over-ruled the motion, and defendant excepted.

Counsel for defendant, then proposed to introduce, in evidence, sundry petitions and declarations filed at the same term, some before, and some since, to all of which "written processes" were annexed by the Clerk, for the purpose of rebutting the evidence of the Clerk.

The Court repelled the evidence, and defendant excepted.

The presiding Judge then passed the following order in said cases, to-wit:

It appearing to the Court, by the evidence under oath of C. E. F. W. Campbell, former Clerk of the Superior Court, and who was acting as Clerk at the time, that when the declarations in these cases were originally filed in his office, he issued processes with said declarations as required by law; and it further appearing, as aforesaid, that said processes

have been lost, or mislaid, and cannot be found. It is, therefore, ordered by the Court, that processes in said cases do issue "instanter," and that the same be attached to the declarations by the Clerk.

Error is assigned on these various rulings of the Court.

GEO. T. BARTLETT, for plaintiff in error.

W. A. LOFTON, for defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

1. The first exception taken to the rulings of the Court below, is to that over-ruling the defendant's objection to the competency of one Campbell, who was the Clerk of the Court when the declarations in these cases were filed; the object being, to show that processes had been annexed to the declarations when filed. Was Campbell a competent witness? Had the plaintiff's action failed, by reason of his neglect to annex processes to the declarations, he would have been liable to the plaintiff for damages. Again, the Law allows the Clerk of the Superior Court a certain fixed compensation for annexing process, and for copy process. The Law furthermore expressly prohibits the Clerk from charging parties litigant for any service not actually rendered. If these processes had been annexed to the declarations, Campbell would, at the end of the suit, be entitled to a fee for that service; otherwise, he would not. He had, then, clearly an interest to the extent of his fees for processes, in establishing the fact, that they had been annexed, and however small the interest may be, if certain and fixed, it renders the party interested incompetent as a witness. There was, therefore, error in this ruling.

2. It is assigned as error, that supposing the witness, Campbell, competent, the Court, without sufficient evidence that processes had been attached to the original declarations, ordered processes to be issued instanter, and to be attached to the declarations.

In this order, it is assumed that processes had been attached, and if so, that fact must have appeared from Campbell's evidence—there being no other to the point. Campbell swears positively to nothing. He gives his "recollection

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tion" as to what he did. And what was that recollection? That he made out and signed processes for these cases, on separate papers, and laid them loosely in the folds of the declarations. This is not "*annexing*" process. The Law expressly requires that process shall be "*annexed*" to the declaration. And further, that any "process issued and returned in any other way, shall be null and void." It is the process that brings the party into Court; hence the particularity of the Law. We hold that process must be either written, or printed and written, on the same paper with the declaration, or, if written on different paper, *that* must be securely attached by wax, or by tape, or some other safe ligature, to the declaration. Nothing short of this, is a compliance with the Law. Campbell's testimony negatives such attachment, and there was, therefore, error in the passage of the order.

3. The Law is equally imperative that a copy of the process shall be delivered to the defendant, and one ground of the motion to dismiss these actions, was, that no copies of the processes had been delivered to the defendant. There was not only no proof that this had been done, but there was proof adduced by the plaintiff, himself, that it had not been done. There was, therefore, error in over-ruling the motion to dismiss on this ground.

JUDGMENT.

Whereupon, It is considered and adjudged, that the Judgment of the Court below be reversed, on the ground that the Court erred in over-ruling the motion to dismiss said actions—this Court holding, first, That the Clerk in office at the time said declarations were filed, was an incompetent witness to prove that he had annexed process to the declarations; secondly, That his testimony did not show that any process had been "*annexed*" to the original declarations; thirdly, That the evidence offered by plaintiff, showed that no copy process had been attached to the copy declaration.

ATWOOD vs. NORTON.

A verbal contract made on the 14th December, 1856, for the rent of house and lot, for the year 1857, is an agreement not to be performed within the space of one year from the making thereof, and, therefore, void under the Statute of Frauds, &c.

Assumpsit for Rent, in Greene Superior Court. Tried before Judge HARRIS, at the September Term, 1860.

Atwood brought an action, in Greene Superior Court, against Norton, to recover two hundred and fifty dollars, for the rent of a house and lot in the town of Greensboro', known as the "Merrill place."

To this action the defendant set up, amongst other pleas, that the contract was void, as being against the provisions of the Statute of Frauds.

On the trial of the case, in the Court below, the following evidence was adduced, to-wit:

Evidence for the Plaintiff.

GEORGE O. DAWSON testified: That, as Agent for the plaintiff, he rented to defendant a house and lot in Greensboro', known as the "Merrill lot," for the year 1857, at the sum of two hundred and fifty dollars, fifty dollars of which sum was to be laid out and expended by the defendant in repairs upon said place. The contract was closed near the corner of Mr. Samuel Davis' garden, on the 14th of December, 1856, and after the witness had had a conversation with Mrs. Norton, Miss Celestia Foster, and Mrs. Poullain, and had left them, defendant told witness he would take the house at the price stated, and that it was a trade; and defendant was told by witness, that he could have possession at any time he wished; that owing to the said contract, the house was not rented to any one else, as the witness and plaintiff relied on the defendant taking it; that a few days before Christmas, 1856, a dispute arose between defendant and the witness, as to the renting of the house, in which defendant denied renting it, upon which, witness slapped his jaws; at that time, one William C. Smith had the key of the house; nothing was said about reducing the contract to writing, nor was there any writing executed; plaintiff had instructed the

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witness to rent the house at three hundred dollars if he could, and if he could not, to take less.

HIRAM ROUZZER testified: That defendant told witness, a short time before Christmas, 1856, that he either had rented, or had a notion of renting the Merrill place, (witness not remembering which) and wanted witness to do some repairs on the place; defendant said he preferred to get witness to do the work, rather than employ a negro to do it; no work was done by witness on the lot for defendant.

JOHN A. MILLER testified: That some time in December, 1856, the defendant requested witness to go with him to the Merrill place, saying, that he had rented it for the next year, and was to give two hundred and fifty dollars for it; upon going to the house, we found Mr. McRea in possession, and plaintiff's furniture was in the house.

Miss MARY H. MATTHEWS, in answer to interrogatories, testified: That she met the defendant in the street, in the town of Greenvboro', when defendant asked witness if she knew that he was going to be her neighbor? or told witness that he was going to be her neighbor, the witness does not recollect which expression was used, nor the time it was used, but it was before the difficulty between the defendant and Mr. Dawson.

The following letters of defendant were read in evidence:

"GREENESBORO', October 24, 1856.

MR. H. ATWOOD—*Dear Sir:* I wish to rent a dwelling house for next year. The object of this letter is to inquire if your Merrill house is to rent. If yea, what is the lowest price for it? I can give you as good a note as this town can make, to secure you the rent. Please answer by return mail.

Yours respectfully. C. C. NORTON."

"GREENESBORO', December 10, 1856.

MR. ATWOOD—*Dear Sir:* As you requested when I last talked with you about the rent of your Merrill lot, I write to inform you, that I am bound to give another person an answer by Saturday, whether I will rent his house or not. I now renew my offer to you, to rent your house. Will give you \$250 from January to January, 1858. You to move your furniture, and have a chimney built, and the part of the house shingled that leaks. If you prefer, I will make these improvements and deduct it from the rent. Please let

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me hear from you by Saturday morning. Neither Mr. Dawson or McRea are in town.

Yours truly,

C. C. NORTON."

December 13, 1856.

MR. ATWOOD—*Dear Sir:* Mr. Dawson got home last night. I can wait for an answer about the house until next Tuesday morning. Mr. Geo. O. Dawson will be here only a day or two, I learn.

Yours truly,

C. C. NORTON."

JAMES L. BROWN testified: That Miss Mary H. Matthews resides in the neighborhood of the Merrill place.

Evidence for Defendant.

In answer to interrogatories taken out for Mrs. Evelina H. Poullain and Miss Celestia C. Foster, Mrs. POUILLAIN testified: That she had a conversation with Mr. Geo. O. Dawson, at her house, in the town of Greensboro', on the 17th of December, 1856, in which Mr. Dawson said, that as he could not rent the Merrill place belonging to the plaintiff, to the defendant, he had come to see if he could not rent it to the women. To this, witness replied that she had nothing to do with the renting of the house, herself, but that she would be satisfied with any arrangement he might make with the defendant and Thomas N. Poullain, jr, as they were her agents, in whom she had the utmost confidence. Defendant then came into the room, and in the course of the conversation, said that Mr. Dawson could not rent the house to him on the terms proposed, inasmuch as he (Dawson) had refused to put the needed repairs upon the house to make it comfortable; that the house needed shingling, the fence repairing, and an out-house needed a chimney. Mr. Dawson replied that he would make no repairs, but wanted defendant to give him his note for \$250 for the rent, and if he got the note he cared nothing about repairs. To this, defendant replied that if he, Dawson, would draw up such an instrument, in writing, as would be agreeable to him and Mr. Poullain, he would sign it.

Miss CELESTIA C. FOSTER testified: That she heard the conversation detailed by Mrs. Poullain from the point at which the defendant entered the room as referred to by her,

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and that she corroborates Mrs. Poullain's evidence from that point.

Both witnesses further testified: That said house and lot were to have been rented for Mrs. Evelina H. Poullain; the contract was to be in writing; the price to be paid, was two hundred and fifty dollars, provided the repairs aforesaid were placed upon the property; there was no agreement about plaintiff's furniture, although something was said about it; the witnesses do not know, of their own knowledge, that Mr. Dawson was plaintiff's agent; they never had but one interview, or heard but one conversation with Mr. Dawson on the subject of renting the Merrill place, and that one is the one before detailed.

The testimony being closed, the presiding Judge said:—"That, in his opinion, the plaintiff had failed to overcome the bar of the Statute of Frauds, which the contract involved, and that it was proper, upon the proofs made, to order a nonsuit, and that he did so order."

This decision is the error alleged in the record.

WINGFIELD, for the plaintiff in error..

REESE, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

The objection to the plaintiff's right to recover in this case, is, That the contract was obnoxious to the Statute of Frauds, in this: that it is an agreement that is not to be performed within the space of one year from the making thereof; the same not being in writing and signed by the party to be charged therewith. And we think that the objection is well taken. The testimony of Dawson is, That, on the 14th of December, 1856, he, as the agent of the plaintiff, rented to the defendant a house and lot, in Greenvboro', for the year 1857, for the sum of \$250, \$50 of which sum to be expended in repairs upon said place. The contract of the plaintiff was, that the defendant should have the use and occupation of the premises during the entire year 1857. His right to the enforcement of the defendant's agreement, depended upon his full performance of the contract, and that could not be completed within one year from the 14th of December, 1856.

So the agreement was not to, and could not, be performed within one year from the making thereof, on either side, and does not, therefore, fall within the rule laid down by this Court in *Johnson vs. Watson*, 1 *Kelly* 351, or any of the cases there cited. One of the tests for determining whether an agreement falls within the Statute is, whether either of the parties can terminate the contract without violating its terms within the year. In this case, it is manifest that neither could do so, without the assent of the other.

The plaintiff relies mainly on the fact, that the contract was the result of written propositions by the defendant for the rent of the premises during the year 1857. Counsel insisting, that when a proposition is submitted on the one side in writing, and accepted on the other, that the contract is not within the Statute, although it is not to be performed within the year, notwithstanding, the acceptance was not in writing, and a number of authorities were read in support of that proposition. It is unnecessary to decide that question one way or the other, as it is not the case before us. The proposition made by the defendant, is to be found in his letter of the 10th of December, addressed to the plaintiff, in which he says: "Will give \$250 from January to January, 1858. You to move your furniture, and have a chimney built, and the part of the house shingled that leaks." If the plaintiff had accepted that proposition, the case would have been the one contended for by his counsel—but he did not. The agreement actually made and sued upon, is a very different one. In the agreement sued upon, and proven, the defendant agreed to pay \$250 for the rent, \$50, only, of which was to be expended in repairs. In the written proposition of defendant, a chimney was to be built, and the roof repaired by the plaintiff, no matter what the cost of such repairs, or improvement, might be. In the one sued on, the cost of repairs is limited to \$50, and in that lies the difference, which is sufficient to prevent the application of the principle relied on, to this case.

JUDGMENT.

WHEREUPON, It is considered and adjudged, by the Court, that the Judgment of the Court below be affirmed.

MADDOX vs. SIMMONS AND GRIFFIN.

1. When the verdict of the jury is strongly and decidedly against the weight of the evidence, and the Court is satisfied that justice has not been done, a new trial will be granted.
2. Mere weakness of mind, if the person be legally *compos mentis*, is no ground for setting aside a contract.
3. The Bar in fixing the standard of legal competency to contract, has taken a low standard of capacity.
4. Imbecility and eccentricity of mind, not the same.
5. In the absence of fraud, or deception, the Court will rarely set aside a contract on account of inadequacy of consideration; though gross inadequacy may be looked to as an evidence of imposition.
6. It may be well said, that in the absence of fraud, mere inadequacy of consideration, is no ground for avoiding a contract.
7. In cases where imbecility of mind and inadequacy of consideration unite—especially where these are united of an abuse of confidence which the one party reposed in the other— the Court has granted relief without other evidence of imposition.
8. The Court is not bound to decree a specific performance in any case, where it would not set aside the contract; nor to set aside any contract that it would not order to be specifically performed.

In Equity, in Putnam Superior Court. Tried before Judge HARRIS, at the September Term, 1860.

Alfred Simmons and William S. Griffin, filed their bill in Equity, in the Superior Court of Putnam County, against John Z. Maddox, the allegations of which are substantially as follows, to-wit:

In November, 1856, Green Simmons died in Putnam County, intestate, and without issue; that at the time of his death, he was entitled, as of his own right and property to the following negro slaves, to-wit: Maria, aged fifty years, and worth one hundred dollars; Dawson, aged seventeen years, and worth eleven hundred dollars; Nancy, aged thirteen years, and worth eight hundred dollars; John Wesley, aged eight years, and worth six hundred dollars; Raymond, aged five years, and worth one hundred dollars; and Merrill, aged four years, and worth three hundred dollars. Also, the following property, to-wit: five head of cattle, worth twenty-five dollars; one buggy and harness, worth forty dollars; a lot of carpenter's tools, worth fifty dollars; a silver watch.

worth fifty dollars; one double barrel gun, worth forty dollars; and four trunks, worth twenty dollars, besides other property of the value of one thousand dollars; that at the May Term, 1858, of the Court of Ordinary of Putnam County, letters of administration on the estate of the said Green Simmons, deceased, were regularly granted to the complainants; that after their qualification as administrators, they were informed, that the said John Z. Maddox had in his possession, the negro slaves aforesaid, as well as the other property before enumerated: that on the 5th day of May, 1858, complainants demanded the said property, and the said Maddox refused to deliver it up; that the said Maddox claimed the negroes under and by virtue of a bill of sale made by the deceased in his life time, and an agreement made by said Maddox at the same time, both being dated the 8th of November, 1855, and which are as follows, to-wit:

GEORGIA, PUTNAM COUNTY:—

This Indenture, made and executed this, the eighth day of November, 1855, between Green Simmons of the first part, and John Z. Maddox of the other part, both of the county and State aforesaid, witnesseth: that, for and in consideration of the sum of five dollars by the said John Z. Maddox, to the said Green Simmons in hand paid, at, and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, as well as for the undertaking, on the part of the said John Z. Maddox, that he will furnish to the said Green Simmons, a comfortable home, and give him a decent support for the balance of his life, and a decent christian burial to his body after his death; he, the said Green Simmons, hath granted, bargained, and sold, and for the consideration above stated, does, by these presents, grant, bargain, and sell, unto the said John Z. Maddox, the following nine negroes, and their increase, to-wit: Maria, Caroline, Henry, Sam. Dawson, Nancy, Raymond, Wesley, and Merrill, the child of the woman Caroline; to have and to hold said named property and its increase, to him, the said John Z. Maddox, and his heirs forever. And the said Green Simmons doth hereby warrant the title to the said property herein conveyed, to the said John Z. Maddox, his heirs and assigns, against himself, his heirs and assigns, and against all and every other person, and especially against the title of Robert A. Ladd, and all claiming under him; he, the said

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Simmons, especially, hereby revoking the instrument made in favor of the said Ladd, embracing said negroes, and other property, the same being but a last will and testament in effect, and so intended when made.

In witness of all which, and to carry out the full intention of the above, the said Green Simmons hath hereto set his hand and seal the day and date above written.

Signed, sealed, and delivered in the presence of C. S. Criddle, F. W. Perryman, and G. W. Denham.

[L. s.]

GREEN SIMMONS.

GEORGIA, PUTNAM COUNTY:

I, John Z. Maddox, of the County and State aforesaid, do hereby accept the above and foregoing deed, with its conditions, and do agree, on my part, to perform that part of the contract binding on myself.

In witness of which, I have hereunto set my hand and seal, this, the 8th of November, 1855.

Signed, sealed, and delivered in the presence of C. S. Criddle, F. W. Perryman, and G. W. Denham.

JOHN Z. MADDUX.

That the total value of the slaves embraced in said instrument of conveyance, was fifty-five hundred dollars; that, at the time of making said bill of sale, and for many years previous thereto, the said Green Simmons was, and had been imbecile in mind, and incapable of making a valid contract; that he was foolishly credulous, unstable, and subject to be imposed upon by any one disposed to take advantage of his condition; that the said John Z. Maddox procured said Green Simmons to make said bill of sale, by fraud, false promises, misrepresentation, and the exercise of undue influence over, and upon the said Green Simmons at a time when his condition of mind and body were such as to cause him to yield to the most foolish and unreasonable propositions, and when he was utterly incapable, from mental weakness, of resisting the importunities of the said John Z. Maddox; that after thus obtaining the said conveyance, on the terms and conditions therein recited, and on which alone the said conveyance was obtained, the said John Z. Maddox did not furnish the said Green Simmons with a comfortable home, but put him off without any white attendant, and did not take care of him, or give him a decent support; but, on the contrary, neglected

him during sickness, and suffered him to die in utter neglect, and without attention or comfort; that the negro man, Henry, mentioned in the deed, was sold by the Sheriff of Putnam County, on the first Tuesday in November, 1856, to satisfy sundry *fi fas* issued from the Superior, Inferior, and Justices Courts of said county, from judgments, some of which were obtained against the said Green Simmons before, and others after the date of said bill of sale; and that at said Sheriff's sale, the said John Z. Maddox became the purchaser of said slave, (Henry) at the price of twelve hundred and fifty dollars, three hundred and forty-nine dollars and 68 cents of which sum, the said John Z. Maddox retained, after paying off the sums due on the *fi fas*; that the negro Caroline, never did go into the possession of the said John Z. Maddox, and that said Caroline and Maria, are now dead; that Green Simmons never did deliver the negroes, and other property mentioned in the bill, to the said John Z. Maddox, but that he took possession of the same wrongfully; that the aggregate value of the slaves in the defendant's possession, at the time of filing the bill, is forty-five hundred dollars, and their annual hire is worth, in the aggregate, two hundred dollars.

The complainants pray, that the charges of the bill may be fully answered by the defendant; that the bill of sale may be set aside and annulled; that the defendant be decreed to deliver up the property to complainants, and account for the hire thereof; and that complainants may have such other relief as the facts of their case call for in Equity.

The defendant filed his answer to the complainants' bill, in which he admits the death of Green Simmons without Will and without issue; that complainants are the administrators of deceased, and that they demanded the property of defendant, which he did not deliver to them; that the negroes are correctly enumerated in the bill, and such of them as are alive, are in his possession, and are worth the sum stated in the bill, as to value and hire. The defendant also admits the making of the bill of sale and agreement set forth in the bill, but denies positively that the said Green Simmons was imbecile, or in any manner mentally incapable of making a valid contract; he also denies every charge made against him in the bill, of all imposition, false promises, fraud, undue or improper influence used to induce said Green Simmons to

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make the bill of sale, and insists that the transaction was fair and honorable, and founded on a good, fair, and valuable consideration, and executed in the utmost good faith. The defendant also denies every allegation of the bill, charging him with a failure to comply with his part of the contract set forth in the bill, and insists that he gave him, the said Green Simmons, a comfortable home and a decent support, to the hour of his death; that he offered the deceased a home, either at the hotel in Eatonton, or where the defendant then boarded; that said deceased preferred to remain at the defendant's plantation; that the defendant gave the said Green Simmons the very best medical attention, employing an eminent physician to see him at the physician's discretion; that he gave him every comfort that could be procured, and from the time he was confined to his bed, that the defendant moved another bed to the house, and remained constantly with him, until he died, whilst his relatives ignored him, and neglected him; that after the deceased died, the defendant gave his body a decent christian burial at a spot selected by the deceased himself, in his life time, and that he, the defendant, fully and faithfully discharged every obligation required of him by the deed and contract. The defendant also admits that the boy Henry, was sold at Sheriff's sale, and bought by him; that soon after the bill of sale was executed, Robert A. Ladd took out a possessory warrant for the Slaves which deceased moved from Ladd's house, and the Court awarded the possession of said slaves to Ladd, and that the defendant was driven to a regular action of Trover, to recover them from Ladd; that during the pendency of the action of Trover, the creditors of deceased wanted their money, and the defendant not knowing how the action would terminate, was advised not to risk anything by paying off the debts, and hence suffered the negro, Henry, to be levied on and sold. The defendant admits that he retained the surplus of his bid after paying off the *fi fas*, and insists that it was his right to do so; that since the execution of the bill of sale, he has paid for said Green Simmons, over and above said *fi fas*, about one thousand dollars, first in the possessory warrant, then fees in the Trover action, store accounts, physician's bill, burial expenses, besides his own time attending Court and waiting on the deceased, and that if it becomes necessary for his rights to do so, he claims them all: the de-

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defendant denies having any of the other property mentioned in the bill, but says that it was all disposed of by the said Green Simmons in his life time.

On the trial of the case in the Court below, the following evidence was adduced, to-wit:

Evidence for Complainants.

The bill of sale and agreement between Green Simmons and the defendant, dated 8th of November, 1855, and set forth in the bill.

The fact that Green Simmons died in November, 1856.

DR. CLOPTON testified: That, at the time of the trial, the negroes, Sam, Dawson, Nancy, Wesley, Raymond, and Merrill, were worth, in the aggregate, from four thousand to forty-five hundred dollars; that he knew Green Simmons well for twenty-five years, and attended him for many years as his family physician; lived within four miles of him for a time, and saw him every week; that Simmons always had a very weak mind, had no stability, and would fly off from the subject on which he was talking; after an attack of typhoid pneumonia, he was for several days entirely without mind, and his mind after that, was not as good as it had been before; after the attack of pneumonia, he did not consider him capable of contracting, and if dealing with him, would not consider that he was dealing with a man on equal terms; the attack of pneumonia occurred while Simmons lived at Ladd's, and before the bill of sale was executed.

Cross-examined: Simmons could beat witness killing wild turkeys. Witness traded with Simmons, took his note, sued him, and no motion was ever made by witness, or others, to have a guardian appointed for Simmons; he was fractious; had the character of being shrewd; was considered half-witted; witness saw but little of him after he went to defendant's; had a settlement with him when he and Ladd fell out.

ALEXANDER B. HARRISON and BLUMER WHITE testified: That they had known Green Simmons for forty years, and lived part of that time in the same neighborhood, but were never intimate with him. R. E. Claiborne sued Simmons in a Justice's Court, in which they presided. The suit was brought to recover the amount of an account founded on an order given by Simmons to Claiborne, to let his negroes have what goods they wanted whenever they came riding a certain gray horse. Simmons would first have sworn that he did not

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give the order, but afterwards admitted that he did give it. The Court gave judgment against Simmons, and he appealed. On the second trial, Simmons swore that he did not give the order, whereupon there was a mistrial. On the third trial, Claiborne recovered. Witnesses thought, at the time, that he was incapable of making contracts, and ought to have had a guardian. Alfred Simmons is a brother of Green Simmons. Green Simmons had no wife or children, his wife having died.

Cross-examined: Simmons did not want to pay Claiborne's account, because he said that Claiborne let the negroes have goods when they rode the wrong horse. The trial was in August, 1855.

ROBERT E. CLAIBORNE testified: That he was present at the trial referred to by Harrison and White. Simmons contended that witness was to credit him when his negroes came upon a certain horse. Simmons afterwards told him to credit him when they rode any horse.

Cross-examined: From what transpired at the time, witness would not make any more contracts with Simmons. Witness did not think Simmons was a rascal trying to get the advantage.

JOSEPH BACHELOR testified: That he lived at Mr. Little's: that he was at a corn shucking at Hargrove's, where the negroes were. William Maddox and John G. Maddox went off with the negroes, saying that Green Simmons had sent them for the negroes, and that they were going to take them to him. There was some liquor along, carried by a boy that William Maddox had with him. John Maddox stopped at Little's, where William Maddox lived at the time.

Cross-examined: Dr. John Maddox lived some fifteen miles from Little's, but attended the negroes as a physician.

ZACHARIAH ROUGHTON testified: That before William Maddox married, he said to witness, that Ladd had Simmons' negroes for his maintenance; that he, William Maddox, could get them on the same terms, and intended to do so; this was before the deed was executed. He said further, that Simmons was to give him twenty-five dollars to get the negroes, and that he did afterwards give him a silver watch, which he showed to witness. He further said, that Simmons would not live long, and he might as well have his negroes as Ladd.

Cross-examined: Has no kind feeling for William Mad-

dox, and has never heard defendant say anything on the subject.

LEWIS T. YANCEY testified: That he had known Simmons since 1843; was acting as bailiff in Simmons' district, and found him to be a man shifty and variable; fluctuating in business with him; regarded him uncertain; saw him give in his tax, estimating nine negroes at \$3,000, and an old buggy that needed repairs, and a horse at \$300; the negroes were better worth \$6,000 than the horse and buggy were \$300. In the trial of a suit; Simmons denied facts under oath, which he afterwards admitted to be true.

Cross-examined: The transaction occurred in 1857 or 1858; do not know whether he wanted to sell the buggy or not. Simmons was shifty and dodging in money matters. Witness, as bailiff, did not get much from him: he instructed witness to levy on property at Ladd's.

JONATHAN J. WINSLETT testified: That he had known Simmons a good while; sat on the Jury on the trial referred to by Harrison and White, and confirms what they stated, also confirms what Yancey testified to, as to Simmons giving in his tax.

LEWIS T. YANCEY, reintroduced, testified: That the keeping of Simmons was worth one hundred dollars per year.

The *fi fas* mentioned in the bill, under which the negro boy Henry was sold, were read in evidence.

DR. THOMAS CLOPTON being reintroduced, testified: Simmons was fifty or sixty years old; had pneumonia, which left him with a cough; he lived twelve or eighteen months after he went to the defendant.

Evidence for Defendant.

COL. NATHANIEL G. FOSTER testified: That his fee in this case was not conditional; that a short time before the bill of sale was executed, Dr. John Z. Maddox brought to his office a copy of a paper, executed by Greene Simmons to Robert Ladd, with a message that Simmons desired witness' opinion in reference to the revocability of said paper. Simmons wanted the witness to draw up a paper conveying the negroes to Maddox in consideration of his maintaining him during his life; that he drew the paper, delivered it to him in blank, with instructions as to its execution: that sometime thereafter Simmons came to witness' house in Madison, and stated

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that Ladd had treated him badly; had cursed him and told him to take his negroes away; that Simmons went to Maddox's to live, and after he got his negroes away, Ladd got out a possessory warrant for them; that he is certain Simmons came to see him once or twice. Witness was coming to Eatonton, and according to promise called at Mrs. Maddox's. Simmons came there with a boy behind him; Ladd had all the other negroes. On that day Simmons urged and entreated Maddox to sue for the negroes; advised him to bring an action of Trover. Maddox was indisposed, and very reluctant to take the risk and trouble. Simmons urged him to sue, as he thought him under obligation to do it. Witness so advised himself. Maddox employed witness to bring the suit. On the trial of the case, witness consulted with Simmons, and found him very useful, and preferred him to Maddox for assistance. Simmons was very shrewd; understood the points in the case, and suggested very pertinent questions to be asked of the witnesses; indeed he was the important man in making, suggesting facts and points during the trial of the case against Ladd. The deed to Maddox had then been executed, and the title was understood to be in Maddox. Maddox boarded at Boswell's about ten or eleven miles above Eatonton. Simmons lived four miles from Eatonton. Witness got to Mrs. Maddox's about 11 o'clock, A. M., and Simmons came about 2 o'clock, P. M. Simmons, William and John Maddox and T. M. Collinsworth were all there: the conversation was about the controversy between Ladd and them. Simmons did most of the talking. William Maddox came to see witness after he was arrested; he was living then at Little's; he talked about the possessory warrant case, and was defended by Lucian Dawson. Witness never discovered that Simmons was weak or imbecile: he was a shrewder man than Maddox. If witness had to trust his rights with Simmons or Maddox in a trade, he would prefer Simmons. Simmons knew that the title to the property was in Maddox, so recognised it and was satisfied with it up to the last interview witness had with him.

Cross Examined.

Simmons came up to witness' house after the fuss with Ladd—did not see Maddox—Simmons was living with Maddox at the time. Maddox brought the deed to Simmons

Witness told Maddox that he would have to pay the debts of Simmons, although he did not insert a clause to that effect in the deed. Its omission, if a fault, is the fault of witness. Maddox took the property with that understanding. Witness' visit to Mrs. Maddox's was in the summer, after the deed was executed. Simmons came unexpectedly to witness; he heard that witness was there, and came to consult with him about getting the negroes from Ladd.

MOSES PRESLEY testified: That he has known Green Simmons since the year 1818; he was very ingenious, and talked like a man of good sense. He came to the house of witness in Monroe, Walton county, and stayed there three days; he told witness that old man Maddox was always kind to him, and that John was so much like him that he wanted him to have his negroes; Simmons' mind and memory seemed to be good; witness talked a great deal with him; Simmons recollected perfectly, all the interesting incidents of their past life; recollected them better than witness did; Simmons said that he wanted to live with Ladd, but they treated him so badly he could not; that he was afraid Ladd would kill him; that once when he was sick, Ladd took him by the throat and jerked him out of the bed on the floor, and with an oath threatened to stamp his liver out; that Ladd made a great fuss because he stood in his own house and shot through the window, at a chicken in the yard; that he was afraid Ladd would poison him; that Maddox had given him a home; that he was better satisfied than he had ever been before, and that he wanted Maddox to have his negroes.

Cross Examined.

William Simmons, a cousin of Green Simmons, was a son-in-law of old man Maddox, the father of John Maddox; Greene Simmons lived at old man Maddox's, and had a gunshop; witness lived near them; witness has lived out of Putnam county for fifteen years. When Simmons was at witness' house in Monroe, he talked of old matters, that witness had forgotten; Simmons said that he was afraid to drink coffee at Ladd's, and that Ladd had treated him cruelly when he was sick.

DONALDSON PRITCHARD testified: That Green Simmons was his brother-in-law; witness knew him up to the year 1853; he was a shrewd man, and had a fair mind; he was not con-

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sidered to be of weak or imbecile mind; witness had nothing to do with him, because he did not like Simmons' way of doing business.

Cross Examined.

Simmons was eccentric, irascible and unreliable; he would often feign to be angry upon slight cause; he was peculiar, and would promise one thing and do another.

WILLIAM W. GARRARD testified: That Green Simmons married his sister, and he knew him from 1806 up to the time of his death; he was more knave than fool, and always got the advantage in dealing if he could some years ago, he wanted witness to advance some money to him, and move the negroes to Texas for witness' sister to have them; he said the negroes come from her family, and she ought to have them, and that he could get them out of Ladd's hands very easy.

Cross Examined: Simmons lived with Ladd after the conversation about the negroes; Simmons was a peculiar man and would not stand to his contracts; he was not friendly with his brothers, and told witness that he would not speak to any of them.

ZACHARIAH EDMONDSON testified: That he and Simmons were boys together; that witness regarded him as having an ordinary good mind, with remarkable cunning for one of his sense; he lived on witness' land in 1843, and called on witness to write a Will for Ladd, which he did; afterwards he wanted it altered, which was done; afterwards he came and wanted his property to be given to him or his children; Henry to his son William; Samto Sidney; he did not want Ladd to know of the Will; after the Will was executed he asked witness for money which he loaned to him and took his note: his son told witness that on a certain occasion, Simmons swore that he lived in Hancock county, and gave as a reason for so swearing, that he had engaged boarding in that county for the purpose of carrying on some litigation there; saw him when sued make out a set-off against the plaintiff about equal to the plaintiff's claim; he resided in Putnam when he swore that he lived in Hancock; after he fell out with Ladd, he sent a negro to witness' house to get back there; came also himself for that purpose. Witness wanted to give him five thousand dollars for his negroes, and also support him during his life, the amount to be payable at witness' death, but he refused.

Cross Examined: Simmons could not be easily imposed upon; he lived on witness' place in 1848, 1850, 1851, and 1852, and he was with him often; he then went to Ladd's. When he left witness' place he was as capable of disposing of his property as witness was; witness does not know where William Maddox lived in 1855. About the time Simmons went to Ladd's, Ladd had great influence over him.

CULLEN S. CRIDELL testified: That he witnessed the deed from Simmons to the defendant; saw some of the negroes there at the time, and understood that they were delivered at the time. Witness read the deed to Simmons, who executed it freely and voluntarily.

Cross Examined: The deed was executed at Dr. Maddox's, one mile distant from witness' house; Maddox requested witness to go; no one present but the witnesses and William Maddox; witness remained probably one hour; Simmons then lived at Dr. Maddox's plantation; he was sixty or sixty-five years old; he did not lie down while witness was there, but he was feeble; thinks Mr. Tucker was also present. Dr. Maddox then lived at Boswell's, and he thinks Simmons lived at the plantation by himself; James Maddox was often there; William Maddox lived in the lower part of the county, and was sometimes there; thinks Simmons was capable of making the deed, and comprehended it.

JAMES W. MAPPIN testified: That he had been acquainted with Green Simmons ever since 1843, and had frequent interviews with him; heard him speak of having had difficulties in getting his property; he spoke of his intimacy with old man Maddox, and said that John was a "chip off the old block"; he said he was well provided for by defendant, and that he was perfectly satisfied. Witness proposed to send him table luxuries if he needed any, but he declined them, saying that defendant provided him with all such things that he desired; witness saw his table furnished with such delicacies; Simmons said he was too sharp for Ladd. He saw nothing that indicated weakness of mind in Simmons, and it did not so much as occur to the witness, that he was ever supposed to be of weak mind; he seemed perfectly to understand the nature and import of the deed to defendant; he had negroes to wait on him. Witness would not take care of him as Maddox had done, for five hundred dollars a year. Simmons lived in the house where Maddox now lives, about one hundred and fifty yards from witness' plantation.

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Cross-examined: Simmons lived alone until Maddox moved there, after he was taken sick; he lived there about one year. Witness received an order written in one hand, and signed in a tremulous hand by Simmons, directing witness to pay the residue of the price at which Henry was sold, to Maddox. William Maddox lived at Robert Little's.

Re-examined: Simmons made a sun-dial while at Maddox's, and took witness out in the yard to see it, and explained the principles of it to witness.

JAMES M. LUCKEY testified: That he went to Monroe with Simmons, in a buggy, after the deed to defendant was made; he went to Moses Presley's. On the road from Madison to Monroe, Simmons told him that he was satisfied with the arrangement with Maddox; that he had previously made a Will in favor of Ladd, knowing that it was a Will at the time, and designing it as such, but that the paper to Maddox was safe; that he did not like his brothers, and did not intend that they should ever have anything he had, as they had never treated him with kindness or justice.

Cross-examined: Witness is defendant's nephew. The conversation testified to, occurred on the road, and thinks Simmons introduced it, but is not certain; thinks it was in December, 1855; it was after the deed was executed. Simmons and witness started from defendant's plantation; Simmons had a cough, and was feeble; witness went to Monroe on business of his own, and stayed three or four days, and came back with Simmons; it was cold weather.

Col. ISHAM S. FANNIN testified: That he was employed to attend to some possessory warrant cases by Simmons, who gave him the history of the cases, and witness found on the trial, that the statement was about as accurate as the statements of clients usually are, in regard to their cases; he saw no defect of mind, or memory, in Simmons; he gave a very intelligent account of the whole case; he told witness that he had gotten William Maddox to get the negroes out of Ladd's possession.

Cross examined: At the time Simmons came to Madison to see witness, a negro boy came with him. William Maddox and defendant were counselling with Simmons at the trial of the possessory warrants; it was very cold weather at the time of the trial. Witness had never been acquainted with Simmons until he saw him in connexion with the trial.

and did not think he was under the control of the Maddoxes; he had but little conversation with him here at the trial.

ALBERT G. FOSTER testified: That he was with Col. Fanin at the time testified to by him; he saw Simmons three times in Madison pending the possessory warrants, about the result of which he seemed to have great apprehension; he did not regard Simmons as having a very strong mind, but ordinary and adequate to the transaction of business: he took the lead in counselling the attorneys and making them suggestions. On the trial, Simmons' statements were verified by all the witnesses except Ladd's son, at whose testimony Simmons was much surprized; he saw no want of mind in Simmons. Maddox was with him one time when he came to Madison, the other two times there was no white person with him.

Cross-examined: Saw Maddox in Madison, though not with Simmons. William Maddox talked freely about almost everything; he talked particularly about having been arrested by Ladd with a possessory warrant, and was not satisfied with the result of the trial, as it seemed to leave an imputation on his character. Defendant was with Simmons in Madison pending the possessory warrants; the first time witness saw defendant in Madison, was the day the deed was written.

DR. JOEL BRANHAM, in answer to interrogatories, testified: That he was acquainted with Green Simmons on the 18th of November, 1855, and had been acquainted with him for twenty-five or thirty years preceeding his death; thinks that his mind and body both, at that time, were, in general, more enfeebled than they had been in his previous history; thinks that, at that time, he was mentally capable of understanding business affairs, of managing his own property, of entering into contracts with reference to business and property: thinks that he was capable of understanding and appreciating the nature, import and obligation of contracts of that character at the time; thinks that his mind was not in such a condition as to render him an easy victim of fraud, imposition and cunning on the part of others; thinks that he was capable of managing his own affairs, and controlling his property with good sense; his mind differed partially from that of other men of common sense and prudence, which resulted partially from general imbecility and weakness, and from oddity and eccentricity; partially from a defect of par-

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ticular organs, and from weakness of the entire mental organism; witness was called in as a physician to visit him in his last sickness at the request of Dr. John Z. Maddox, who paid his medical bill; he was requested by Maddox to continue visiting Simmons as long as he thought it necessary, and to do all in his power to make the case of Simmons comfortable while he lived; Dr. Maddox attended his case, and the witness assisted him until within a day or two of his death; he died of Pulmonary Consumption; thinks he had all the attention that one in his situation could require, and all was done that could be done to make him comfortable; he had a comfortable house and servants to attend him, and upon every visit the witness made him, defendant was with him, and requested witness to make known to him (defendant) any article of food or drink that would make Simmons comfortable, so that they might be procured, and at the suggestion of witness, defendant did procure such things several times.

To cross-interrogatories he testified: Thinks that he was with Simmons, at the house of Dr. Maddox, on the 18th of November, 1855, in company with defendant and his brother, James Maddox; does not know how long anterior to that day, or under what circumstances, Simmons left Ladd's and went to Maddox's; he lived two or three weeks after witness was called to see him; on his first visit, witness decided that Simmons had Consumption and was obliged to die, and so announced to Simmons and Maddox; it is one of the peculiar characteristics of Consumption, that the patient retains his mental faculties in a large majority of instances to the last.

Upon this evidence the Jury under the charge of the Court, returned a verdict and decree; that the bill of sale be set aside and vacated, and that the defendant deliver it up to be cancelled; also that defendant deliver to the complainant the negroes in dispute, and that the complainants refund to the defendant two hundred and twenty dollars.

Whereupon, counsel for defendant moved for a new trial of said case on the following grounds, to-wit:

1. Because the Court erred in his charge to the Jury in saying: "gentlemen, the great battle ground in this case, is the inadequacy of the consideration of the deed to the defendant."

2. Because the Court erred in failing to charge the Jury=

that "the contingency of a recovery of the negroes from Ladd by Maddox should be considered by them, in determining the consideration of the deed," although the point was distinctly made, and argued before the Jury by defendant's counsel.

3. Because the manner and emphasis of the Court in charging the Jury were such as to lead them to believe, that in the Court's opinion the allegations of fraud and imbecility of mind, had been properly made out by the complainants.

4. Because the verdict was contrary to Equity.

5. Because the verdict was strongly and decidedly against the weight of the evidence.

6. Because the verdict was contrary to law.

The presiding Judge, in his decision of the motion for a new trial, does not certify to the truth of the "second" and "third" grounds taken in the motion, but denies that they are true. The motion was overruled, and the new trial was refused, and this decision is brought up for review.

N. G. FOSTER, WM. A. REID, DAVIS & LAWSON, for the plaintiff in error.

JUNIUS WINGFIELD, JOHN W. HUDSON and E. A. & J. A. NISBET, for the defendants in error.

By the Court.—LUMPKIN, J., delivering the opinion.

After carefully investigating the facts in this case, we are forced to the conclusion, that the verdict of the Jury is strongly and decidedly against the weight of evidence. We shall not, however, enter upon a review of the testimony to demonstrate the correctness of this result. The proof speaks for itself.

We prefer stating some general principles applicable to this investigation, and then submit it to the reconsideration of another Jury, disclaiming all wish or intention to constrain them to a finding which their own judgments do not approve.

I assume, in the first place, that to establish incapacity in a grantor, he must be shown to have been, at the time, *non compos mentis*, in the legal acceptance of that term; which means, not a partial, but an entire, loss of understanding. The Common Law has not drawn any discriminating line by

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which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. Weakness of understanding is not, of itself, any objection to the validity of a contract. If a man be legally *compos mentis*, he is the disposer of his own property, and his Will stands, for the reason of his actions. *Jackson vs. Caldwell*, 11 Cowen, 207; *Odell vs. Buck*, 21 Wend., 142; *Stewart vs. Lispenard*, 26 Wend., 298 *et seq*; *Clark vs. Fish*, 1 Paige, 171; *Blanchard vs. Nettle*, 3 Denio, 87; *Osterhout vs. Shoemaker*, *id.*, note; *Dean's Med. Jur.*, 555 *et seq*; 2 *Mad. Ch. Pr. et seq.*

To establish any other standard of intellect or information beyond the possession of reason, in its lowest degree, as in itself essential to legal capacity, would, as said by Senator Verplanck, in the great case already cited, (*Stewart's Ex'rs vs. Lispenard*, 26 Wend., 203,) create endless uncertainty, difficulty and litigation; would shake the security of property, and wrest from the aged and infirm that authority over their earnings and savings, which is often their best security against injury and neglect. If you throw aside the old Common Law test of capacity, then proofs of wild speculation or of extravagant and peculiar opinions, or the forgetfulness or prejudice of old age, might be sufficient to shake the fairest conveyance, or impeach the most equitable will. The Law, therefore, in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, and therefore wise and safe. It holds, in the language of a late English commentator (*Shelford on Lunacy*, p. 39) that weak minds differ from strong ones, only in the extent and power of their faculties; but unless they betray a total want of understanding, or idiocy, or delusion, they cannot properly be considered unsound.

Nor is inadequacy alone a sufficient ground, in ordinary cases, for setting aside a conveyance of property. *Ford. Eq. B. 1 ch. 2, § 9, note 2.*; *Osgood vs. Franklin*, 2 Johns. Ch. Rep., 23; *Blackford vs. Christian*, 1 Knapp's Rep., 77; *Dunn vs. Chambers*, 4 Barbour, 376. In the leading case on this subject, (*Heathcote vs. Paignon*, 2 Br. C. C., 167,) Lord Thurlow said, if the Court takes such a ground as to rest upon the market price, every transaction of the kind would come into Equity; and in *Guynne vs. Heaton*, 1 Br. C. C. 9, Lord Thurlow said, that to set aside a conveyance,

there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it; and this doctrine was approved by Lord Eldon, in *Coles vs. Trecothick*, 9 Ves., 246; also, in *Gibson vs. Leyer*, 6 Ves., 273; and by Sir Wm. Grant, in *Peacock vs. Evans*, 16 Ves., 512; and by Chancellor Kent, in the case of *Osgood vs. Franklin*, already referred to.

Courts are not willing to enter into the question, whether the consideration be adequate in value to the thing which is promised in exchange for it. *Hubbard vs. Coolidge*, 1 Metcalf, 93; *Bedel vs. Loomis*, 11 New Hamp., 9. "If a contract deliberately made, without fraud," said Wilde, J., in *Train vs. Gold*, 5 Peek, 384, "and with a full knowledge of all the circumstances, the least consideration will be sufficient." "If there be no suggestion of fraud," says Mr. Smith, "the Court will not hold the promise invalid upon the ground of mere inadequacy; for it is obvious, that to do so, would be to exercise a sort of tyranny over the transactions of parties, who have a right to fix their own value upon their own labor and exertions, and would be prevented from doing so, were they subject to a legal scrutiny on each occasion, on the question, whether the bargain had been such as a prudent man would have entered into.

"Suppose," says the same author, "I think fit to give a thousand pounds for a picture not worth fifty, it is foolish on my part; but if the owner do not take me in, no injury is done; I may have my reasons; I have detected in it the touch of Raphael or Correggio. It would be hard to prevent me from buying it, and hard to prevent my neighbor from making the best of his property, provided he do not take me in, by telling a false story about it."

There are two remarkable instances illustrative of the principle that, in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract. See the two late cases of *Bainbridge vs. Firmston*, 1 Perr. & Dav., 2, (10 Add. & Ell., 309,) and *Wilkinson vs. Oliveira*, 1 Bingham N. C., 490, (27 Eng. Com. Law Rep.,) in which the defendant promised to give the plaintiff £1,000 for use of a letter which contained matters explanatory of a controversy in which he was engaged, and the consideration held not to be inadequate to support the promise.

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There are two *old* cases upon this subject—*Thornborou vs. Whiteacre*, reported in 2 *Ld. Raymond*, 1164, and *James vs. Morgan*, 1 *Lev.*, 111, which will fully compensate the reader for reading. I have referred to them in my Law School, to show to what extent such Judges as Lord Holt have gone to sustain contracts, when assailed for want of consideration.

The first was an action in which the plaintiff declared that the defendant, in consideration of 2s. 6d. paid down, and £4 17s. 6d. to be paid on the performance of the agreement, promised to give the plaintiff 2 grains of rye corn on Monday, the 29th of March, 4 on the next Monday, 8 on the next, 16 on the next, 32 on the next, 64 on the next, 128 on the next, and so on for a year, doubling on every successive Monday, as counsel contended, but on every alternate Monday, as Judge Holt construed, *quod libet*, the quantity delivered on the last Monday. Mr. Salkeld, the Reporter, demurred to the declaration, arguing that, suppose the contract to be performed, the quantity of rye to be delivered would be 524,288,000 quarters, (a quarter is 8 bushels!) and that all the rye grown in the world would not amount to so much. But Lord Holt said, that though the contract was a foolish one, it would hold at Law, and the defendant ought to pay something for his folly. The case was compromised.

James vs. Morgan, 1 *Lev.*, 111, is the old case in which the horse was sold for one barley corn for the first nail in the horse's shoe, two for the second, and so doubling on each nail. The Jury found, under the direction of the Court, £8, the value of the horse. The quantity of barley-corn was estimated at 500 quarters, or 4,000 bushels!

It is proper to add, that in cases where imbecility of mind and inadequacy of consideration unite, though neither standing alone, is sufficient, under ordinary circumstances, to invalidate a contract, the Court has granted relief, without other evidences of imposition; and especially is this the case where imbecility of mind and inadequacy of consideration is united with an abuse of confidence which the one party reposed in the other. *Clarkson vs. Hannay*, 2 *Pierre Wms.*, 204; *Gibson vs. Jeyes*, 6 *Ves.*, 266; *Crow vs. Ballard*, 1 *Ves. Jr.*, 215; *Mortleek vs. Buller*, 10 *Ves.*, 292; *Dealty's Heirs vs. Murphey*, 3 *H. K. Marshall's Rep.*, 475; *Whelan vs. Whelan*, 3 *Cowen*, 537; *Whipple vs. McClure*.

2 Root, 216; Per. Harris, P. J., in Dunn vs. Chambers, 4 Barb., 379.

It need scarcely be remarked, that a Court is not bound to decree a specific performance in any case where it would not set aside the contract, nor to set aside any contract that it would not order to be specifically performed.

It will be for the Jury to apply these rules of Law to the facts of this case, carefully distinguishing between imbecility and eccentricity of mind. Many of the brightest intellects that ever lived have partaken of this latter infirmity, if indeed it be one. One circumstance that is incontrovertibly established, has weighed heavily upon our minds: and that is, that Green Simmons, to the day of his death, seems to have lived and died happy and content with the arrangement which he had made, or, to use his own emphatic language, the "chip off the old block" had not abused his confidence.

As to the other points, we have deemed it unnecessary to notice them. But as an act of justice to the presiding Judge, we have thought it best to append his own opinion entire, to that of the Court. We confess to another motive. Will he pardon the liberty? It will daguerreotype to posterity the peculiarities of our most excellent Brother far better than any *post mortem* eulogy of ours, should Providence impose this duty upon us, which, may Heaven, in its mercy, avert:

JUDGE HARRIS' OPINION.

"I have, since the indication of my opinion, on the last day of Putnam Superior Court, on the several grounds contained in the motion by defendant for a new trial, given to the bill, answer, brief of testimony filed, and the interrogatories in the case, a very careful perusal. This was due to the movant; it was due to myself, as my opinions were by no means so fixed as to be unchanged by more mature consideration.

"There is more in the testimony upon which the verdict can be well supported than I had thought there was during the progress of the trial, or at the time when the motion was made for a new trial.

"And whilst it is due to candor to say, that had I been on the Jury, as then impressed by the testimony, I should have been reluctant to set aside the deed to Maddox, I feel that

now, I must not attempt to control the deliberate finding of the Jury, and that to do so, would be a flagrant violation of the great principle which separates the powers of the Judge and the Jury.

"It is impossible to peruse the testimony, as to the capacity of mind of Simmons, without perceiving *great conflict of opinion*. In such case, who are to decide? Who have the exclusive right to settle the credibility of witnesses? the value and weight of testimony? Who but the Jury? And is there not enough in the testimony of his family physician, Dr. Clopton, and in the proof by others, of Simmons' unstable, varying dispositions of property, keeping in view his age and health, to make it very uncertain whether he had mind enough to make a contract of the kind sought to be set aside?

"The Jury (and it was one distinguished by intelligence and character, and perfect impartiality) thought that Green Simmons had not that degree of mental capacity necessary to the making of such an instrument.

"How easy was it, then, after that point was agreed on, to come to the conclusion that the considerations expressed in the deed were grossly inadequate—indeed, unconscionable, for such an amount of valuable negro property as was conveyed by the deed, especially when they look to the offer of Mr. Edmondson of five thousand dollars for the property, payable at his death, with the promise, in addition, of the support of Simmons, in the meanwhile!

"Dr. Maddox, too, was a stranger to the blood of Simmons. Simmons was an old man, between sixty and sixty-three years of age, laboring under consumption. Should not transactions between parties thus situated be scanned closely? How much easier for Dr. Maddox, whom it is presumed was familiar with the nature of diseases, to count the pulses of life with more accuracy than one not of his profession! indeed, to measure its duration with almost certainty, with the important fact, previously ascertained by him, that Simmons had consumption!

"Can it be doubted that the Jury gave to these facts their full value, and that they formed some of the elements of their judgment?

"Can any fair-minded man, in reviewing this whole case, come to any other conclusion, than that there are facts and circumstances in it enough to sustain the verdict?

"What I have said, disposes of the ground that the verdict is contrary to evidence. But it is said that the verdict is contrary to Law.

"I am somewhat at a loss to perceive how that can be, if there be evidence enough to support the verdict. The two grounds are inseparably allied; so that if the first is not sustained, the second cannot be.

"It has been made a ground for new trial, that I did not charge the Jury, that the contingency of a recovery of the negroes from Ladd, ought to be considered by them in determining the consideration paid by Maddox.

"The defendants' counsel say they made and argued the point. This may be so. No such request was made of me. Before charging the Jury, I stated distinctly that although many requests had been submitted, in writing, by counsel on either side, I would, firstly, give my general charge as to the principles of Law and Equity pertinent to the case, and that if it should not cover all the requests presented, upon my attention being called to it, I would proceed then to charge as to such requests.

"When I had closed the general charge, I desired to know of counsel if there was any request which they desired me to give to the Jury, and paused about a minute for an answer; when Mr. Lawson, one of defendant's counsel handed me a single request, instructing the Jury 'that they should give more credit to a witness who derived his knowledge from long acquaintance with the conduct of Green Simmons, than to one who forms an opinion from a single transaction:' which was given as desired.

"The matter embodied in this ground was *never asked, either in writing or orally, to be given*. To guard against misrepresentation or misapprehension, it is an established rule of the Ocmulgee Circuit, that all requests must be handed in before the general charge is made. In the case under consideration, the rule was relaxed, and the defendant's counsel had the full benefit of the indulgence.

"It is a matter worthy of note, that the substance or matter of the charge is not contested or complained of. On this occasion, I carefully avoided the slightest reference to any portion of the testimony.

"After stating the rule in Equity as to responsive answers, and how only they were to be outweighed to enable the Jury

clearly to determine thereby how stood the charges as to fraudulent combination of John and Wm. Maddox—imposition by John Maddox on Simmons—and of the undue influence of John Maddox over the mind and conduct of Green Simmons, I then proceeded to say, from the course of the argument in the cause, it was apparent that the main battle-ground was the alleged gross inadequacy of consideration paid by Maddox for the property, coupled with the alleged insufficient capacity of mind in Simmons, to make such a contract; both of which must unite before they could set aside the deed on this ground.

“And it is complained of, that I spoke of this last ground as the main battle-field.

“It is very difficult to satisfy the complaints of a losing party. If the remark was exceptionable, it surely was not prejudicial to defendant. With much more show of reason could the plaintiffs have excepted to it.

“But it is gravely asked that a new trial be awarded, for that the ‘manner’ and ‘emphasis’ of the Court misled the Jury.

“This ground has the merit, at least, of novelty.

“Now, before considering it, let it be borne in mind that the propositions in reference to inadequacy of consideration charged, were—

“1st. That the Law required a higher degree of capacity to make a contract than it did to make a will. What that grade was, had not been clearly defined, but it certainly required memory of one’s property; a knowledge of what he was doing; judgment and free assent.

“2d. That Equity abhorred unconscionable bargains; but before it would set contracts aside, two things must unite—incapacity of mind to make a contract, and gross inadequacy of consideration.

“These legal propositions are not disputed; no error alleged against their truth, as principles controlling Courts and Juries; but the ‘manner’ of charging them, and the ‘emphasis’ with which they are alleged to have been charged, is the burthen of complaint.

“I reply, that I am utterly unconcious that on that occasion my manner or emphasis was so marked, as to give the plain words and plain principles a meaning beyond what they naturally conveyed. The charge was calm, passionless, deliber-

ate, and, I think, perspicuous—the intonations of voice even, and so regular as almost to be monotonous.

“Indeed, it is difficult to conjecture how legal abstractions, such as those given in charge, can admit of change by manner or emphasis. I think I have rather too much good taste to attempt at any time to mark such plain and simple truisms as those given in charge, either by such ‘manner’ or ‘emphasis’ as I would repeat some of the remarkable passages of Shakespeare, drawing out a latent beauty or thought which had escaped the cursory reader.

“This ground speaks little for the estimate defendant’s counsel have of the intelligence or fairness of the Jury; it is, moreover, an indirect and covert imputation upon the Judge. Self-respect and the dignity which should characterize, at all times, the deportment of this officer, forbids that he should meet any intended imputation otherwise than by saying, it is unfounded; that it is the offspring ‘of a heat oppressed brain,’ ‘a bodiless creation,’ undefinable, intangible. That my ‘manner’ and ‘emphasis’ may be at all times peculiar and characteristic, I am quite ready to admit; for they are my own, not borrowed. If earnestness and perspicuity are, as it would seem, reprehensible, then to meet the taste and talent of those disposed to be querulous, insipidity and obscurity must be substituted.

“I dismiss this topic without other comment than I have made—less, probably, than it should have provoked, when it is remembered that the counsel by whom this ground was inserted in the motion for new trial, *knew, and had been told by me before the verdict was rendered*, that I thought the plaintiff’s case had not been as well made out as it should have been.”

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be reversed, upon the ground that the verdict was strongly and decidedly against the weight of evidence.

*Denson et al. vs. McLeroy et al.*DENSON *et al* vs. McLEROY *et al*.

1. Equity will not decree the reformation of a deed of gift of a slave, so as to make it conform to the intentions of the donor, if it appear from the evidence that an unconditional parol gift had been made by the donor to the donee, long anterior to the execution of the deed; that the property had been in the possession of the donee continuously, from the time of the parol gift, and that the donee had never accepted the deed sought to be reformed.
2. Verdict to reform a deed, and change the possession of property, conformably to such reformation, under such a state of facts, set aside and a new trial ordered.

In Equity, in Jasper Superior Court. Tried before Judge HARRIS, at the October Term, 1860.

William T. McLeroy, and his wife Mary E. McLeroy, formerly Mary E. Denson, and Sarah Fances Denson, Rebecca Denson, and Lou Ann Denson, exhibited their bill in Equity, in the Superior Court of Jasper County, against James M. Denson, Samuel Allen, Maxey Jordan & Co., William Maxey & Co., Linch & Davis, Davis & Walker. Fears & Swanson, and Presley E. Prichard, in which the following allegations are made, to-wit:

That the female complainants, are children of Elizabeth Denson, and James M. Denson; that Elizabeth Denson was the daughter of one Sarah Ledbetter; that the said Sarah Ledbetter, in the year 1844, was the owner of a negro girl slave by the name of Clara Ann, then about fifteen years of age, and desiring and purposing to make some provision for the comfort, support and maintenance of the said Elizabeth Denson during her natural life, and for her children living at her death, requested one Thomas Respass, to draft a deed of gift to the said Elizabeth Denson and her children in accordance with such desire and purpose; that by mistake, and from a want of skill and knowledge, in the legal import and meaning of words and terms, the said Thomas Respass, drew up a deed of gift, conveying said negro girl Clara Ann "to the said Elizabeth Denson, and the heirs of her body, their heirs and assigns, said negro not to be subject to the debts of the present, or any future husband of the said Elizabeth Denson," instead of conveying the said negro girl, together with her future increase "to the said Elizabeth

Denson, for, and during her natural life, remainder in *fee-simple* to such of her children as might be living at the time of her death," as was the intention, desire and purpose of all the parties to said deed of gift; that on the sixteenth day of November, 1844, the said Sarah Ledbetter executed and delivered the deed prepared as aforesaid, by the said Thomas Respass, believing, and intending, it to convey said negro and her increase according to the purpose and desire aforesaid; that under this impression and belief, the deed and negro were delivered to the said Elizabeth Denson, and her husband James E. Denson; that the said Elizabeth and James M., received said deed and negro with the same belief, intention and understanding, and held the same in accordance therewith; that the said Sarah Ledbetter died, believing the deed to be in accordance with her desire and purpose as hereinbefore expressed; that said negro girl is the mother of five children, to-wit: Arthur, a boy, eight years old; Jane, a girl, six years old; Clark, a boy, four years old; Lucy Ann, a girl, two years old; and John, a child, one year old; that all of said negroes were in the possession of the said James M. Denson at the time of the death of his wife Elizabeth, which occurred on the ——— day of ——— 185—, and that the negroes remained in his possession until the 7th day of January, 1852, when they were levied on as the property of the said James M. Denson, under and by virtue of various Justices' Court *fi. fas*; two in favor of Lynch & Davis; two in favor of Davis & Walker; two in favor of Maxey, Jordan & Co.; one in favor of William Maxey & Co.; one in favor of Fears & Swanson, and one in favor of Presley E. Pritchard; that the complainants have interposed their claim to said negroes, which is now pending in Jasper Superior Court; that one John M. C. Denson, who has removed to parts unknown, and the female complainants, are all the children left living, at the time of the death of the said Elizabeth Denson, their mother.

Complainants, in and by their bill, pray that the defendants may answer the allegations and charges of the bill; that the Sheriff and plaintiffs in *fi. fas*. may be enjoined from selling the negroes until this case is heard; that the deed of gift may be reformed so as to speak the intention, and carry out the purpose of the parties to it as charged in the bill; and that the complainants may have such other relief as they are entitled to under the facts of their case.

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James M. Denson, filed his answer to the bill, in which all the charges and allegations of the bill are admitted, except those relating to the execution and delivery of the deed and negro, and the mistake in the deed, all of which he denies, and insists that at the time of the pretended execution of the deed of gift, the negro girl Clara was his own absolute property, and had been ever since the year 1833 or 1834, at which time the said Sarah Ledbetter, his mother-in-law, in consideration of his intermarriage with her daughter, the said Elizabeth, gave and delivered said negro girl to him, since which time he has held possession of her, claiming her as his own adversely to all the world, and has continually paid taxes for her; that he had no sort of connection or complicity with said deed of gift, and never recognized it in any shape whatever, but repudiated and denied any right of the said Sarah Ledbetter to change the title of said slave after having given her to him: that the children of Clara were born long after the gift of said Clara to him, and whilst she was in his peaceable, uninterrupted adverse possession; that when the said Sarah Ledbetter told the defendant of the deed of gift, he replied to her that it was not worth a piece of brown paper, because Clara was his property, and had been for several years previous; that after the gift of said negro to the defendant, the said Sarah Ledbetter did not pretend to assert any title thereto, but on the contrary recognized defendant's title, and often proposed to hire said negro from him; that said deed was never delivered to defendant or his wife, nor, so far as he knows to any one authorized to receive it for the grantees.

On the trial of the case in the Court below, the bill and answer were read, and the following evidence adduced, to-wit:

Evidence for the Complainants.

The original deed of which the following is a copy:

GEORGIA, PUTNAM COUNTY:

Know all men by these presents, that I, Sarah Ledbetter, of the County and State aforesaid, do this day give unto my daughter, Elizabeth Denson, and the heirs of her body, by deed, a certain negro girl, about fifteen years old, by the name of Clara Ann, which negro is not to be subject to the debts or contracts of her present or future husband; which

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negro I do forever warrant and defend the title to my daughter, Elizabeth Denson, and the heirs of her body, of the County and State aforesaid, their heirs and assigns, against myself, my heirs and assigns forever in *fee-simple*.

In testimony of which I have set my hand and seal, this the 16th of November, 1844.

Signed, sealed, and delivered in the presence of Thomas Respass, Jos. R. Sanford.

[L. s.]

SARAH LEDBETTER.

This deed was proven and recorded on the 27th of November, 1844.

JOSEPH R. SANFORD testified: That he wrote the deed of gift, at the request of Mrs. Ledbetter; her instructions were to so frame the deed as to convey the property to her daughter, Elizabeth Denson, during her life time, and at her death to go to her children surviving at her death; both witnesses and Mrs. Ledbetter thought, that the words used in the deed had the effect to give the negro and her increase, to Mrs. Denson during her life-time, and at her death to her children that might then survive her; this was what Mrs. Ledbetter desired and intended; the deed was given to Thomas Respass to be recorded; witness does not remember hearing James M. Denson say anything about it, nor does he know in whose possession the negro had been previously; Mrs. Ledbetter lived in the upper, and Denson in the lower part of the County of Putnam; the witness knew the negro girl at the time the deed was recorded, she was then fourteen or fifteen years old, and without children; he has not known her since; Mrs. Denson is believed to be dead, but how long the witness does not know; Denson has married again.

On cross-examination he testified: The deed was written according to the witness' understanding of Mrs. Ledbetter's meaning at the time, and she was satisfied with it, as she believed it conveyed the property as she intended it; at the time the deed was made, Mrs. Ledbetter spoke of the negro girl as being at Denson's for the purpose of waiting on Mrs. Denson, who was a consumptive, and in low health: the witness never heard any one complain of the way the deed was written, and never heard Denson say anything on the subject.

THOMAS RESPASS testified: That he knew the defendants but not the plaintiffs; he witnessed the deed, but does not

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recollect at whose instance ; Mrs. Ledbetter said she wanted the negro secured to Mrs. Denson and her children ; the witness understood Mrs. Ledbetter to say that she wanted Mrs. Denson to have a life-estate in the negro, and that after Mrs. Denson's death, she wanted the negro and her increase to go to Mrs. Denson's children, and that the negroes should not be subject to Denson's debts ; Denson had the negro in possession when the deed was made, but what was the nature or duration of that possession, the witness does not know ; the witness had the deed recorded, and then handed it to Denson, who did not question Mrs. Ledbetter's right, thus to dispose of the negro ; Denson did not say anything about the deed after its execution ; he does not know who had possession of the negro from 1832 to 1844, and never knew her until Denson came to live with witness in 1844 ; he does not know whether Denson was pleased with the deed or not, when witness offered it to him, he said that he would rather witness would keep it.

JAMES N. LYNCH testified : That he was acquainted with Mrs. Ledbetter and the negro girl Clara, but does not know in whose possession the negro had uniformly been previous to 1844, after that time she was in Denson's possession ; the witness never heard either Denson or Mrs. Ledbetter say upon what terms Denson held the negro, or anything about the title or ownership of the negro. Clara has five children, the ages of which witness does not know, except that the oldest is about ten years of age ; the negroes were carried from Denson's about twelve or fourteen months ago by the Sheriff of Jasper County ; witness was once in company with Denson, who had Clara's oldest boy with him, and Denson told witness that the boy belonged to his children, this occurred in the summer of 1855. The witness does not know whether Clara was born when Denson married or not, but is certain that she was not put in Denson's possession when he first married, but she has been in Denson's possession most of the time since 1844.

BARNWELL LEVERITT testified : That in 1855, when the negroes in dispute were levied on, James M. Denson claimed them, and as Denson and witness were members of the same Church, and the general understanding in the neighborhood had been, that the negroes belonged to Denson's children, the witness remonstrated with Denson for claiming them and

acting so badly, to which Denson replied that he was claiming them not for himself, but for his children; witness then asked him if he did not know that if Mrs. Ledbetter could speak from the grave, she would say that she intended the property for Denson's wife and children, to which he, Denson, replied he believed she would; the witness supposed that the words "heirs of the body" meant children, and that Denson's reply, as he supposed, was with reference to the deed; the witnesses understanding that the negroes belonged to Denson's wife and children was derived from long intimacy with the family, and from hearing repeated conversations to that effect in the family, and from having never heard any adverse claim asserted by Denson.

Evidence for the Defendants.

Mrs. MARY BADGER testified: That she knew Mrs. Ledbetter and her negroes, and has known Clara from her childhood. She also knew Denson, who married Elizabeth, the daughter of Mrs. Ledbetter, but she does not recollect the date of the marriage. She has seen Clara under Denson's control, but does not know at what date, or how she came there, except that she saw her going with Mrs. Denson. Mrs. Denson carried her behind her, or horse back. She has seen the negro at work with, and for Denson, and Denson was exercising acts of control and ownership over her. She does not know whether Denson bought Clara, or whether Mrs. Ledbetter gave her or loaned her to him; she heard Mrs. Ledbetter say that Mrs. Denson had done more hard work for her than any of her other girls, and that she intended to give her Clara. Mrs. Ledbetter afterwards told witness that she had given Clara to Mrs. Denson to nurse her baby. Mrs. Ledbetter had eight or ten negroes, and Denson had none at the time; she knows nothing of any deed of gift, and never heard Denson complain of any.

Upon this testimony, the Jury returned a verdict in favor of the complainants, decreeing a reformation of the deed as prayed for in the bill, and a division of the negroes between the complainants by commissioners, in kind if it can be done equally, and if not then the negroes to be sold, and the proceeds divided.

Counsel for defendants then moved for a new trial of the case on the following grounds, to-wit:

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1. Because the verdict is unsupported by evidence.
2. Because the verdict is strongly and decidedly against the weight of the evidence.
3. Because the verdict is contrary to the charge of the Court.
4. Because the verdict is contrary to law.
5. Because the Court stated to the Jury in the conclusion of its charge, that if the Jury should believe it was the intention of Mrs. Ledbetter, (as likely it was,) to give the property to Mrs. Denson for life and remainder to her children, then they should find for the reformation of the deed.
6. Because the Court failed to give the whole law of the case to the Jury in his charge.

The presiding Judge overruled the motion, and refused the new trial; but ignores having used the words, "as likely it was," specified in the 5th ground of the motion.

The refusal to grant the new trial constitutes the error complained of.

WINGFIELD, LOFTON, HUDSON, JORDAN, for the plaintiffs in error.

BARTLETT, DAVIS & LAWSON, for defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

The error assigned in this case is, that the Court below refused to set aside the verdict and grant a new trial.

The motion for a new trial, was predicated upon several grounds, only two of which we deem it necessary to advert to, and these will be considered together, viz: First, that the verdict is contrary to evidence, and secondly, that it is contrary to law.

The prayer of the bill is, that a deed, made by Mrs. Ledbetter, in the year 1844, conveying a certain female slave and her future increase, to Mrs. Denson, (wife of the defendant) "and the heirs of her body, their heirs and assigns," may be so reformed, as to express the real intentions of the donor, viz: to secure a life-estate to Mrs. Denson, with remainder to her children after her death. The first allegation in the bill (after stating the relations in which the complainants stand to Denson and wife, and to Mrs. Ledbetter,) is, that in the year

1844, Mrs. Ledbetter (when the deed in question was made,) *was the owner of the slave Clara*, the subject of the conveyance. Subsequently, it is alleged that Denson, the defendant, and his wife, received the deed, with the understanding that its purport was such as the complainants now seek to have engrafted on it, by decree in Equity. These are important allegations, which must be established by proof to authorize such a decree.


The defendant, in his answer, positively denies both allegations. He states, that the slave Clara was given by Mrs. Ledbetter to his wife, and himself, unconditionally, in the year 1833, eleven years before the making of the deed, and had been ever since in his undisturbed possession. Further, he states that he was not present when the deed was made; nor did he know that the grantee contemplated making such a deed, nor did he receive it with the understanding that the donor's intention was as alleged, or with any other understanding; but refused to receive it at all. On each point he is sustained by one witness, and is contradicted by none.

It is true, some admissions of his, and one given in evidence, militating against the idea of title in him at the time they were made, but they do not touch either the question of title in Mrs. Ledbetter, at the date of the deed, or its rejection by him.

It appears, then, that the title was out of Mrs. Ledbetter at the time she made the deed, and had long been so. Thus is the foundation of the complainants' claim for relief broken up. Equity will never busy itself with the reformation of a deed, after having ascertained that the grantor had no title whatever to the thing conveyed, and that his intentions regarding it were wholly immaterial. We think the Court below erred in refusing to set aside the verdict, and award a new trial, on the grounds that it was contrary to the evidence, and contrary to law.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the judgment of the Court below be affirmed.



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ROE et al vs. DOE et al.

1. Land of J. C. & W. was sold at public outcry, and bid off and paid for by one S.—J. C. & W. being present and assenting to the sale, but no deed or memorandum in writing thereof was ever made to S; in execution of that sale, S. subsequently sold and conveyed the land by his own warranty deed, and as his own to one K. On the trial of ejectment brought by J. C. & W. against K. for the land: *Held* that the sale and purchase by S. did not defeat their title, nor were they estopped by that sale; although they had previously agreed in writing, that the land should be sold, and had also appointed S. to sell, and in their name as their attorney, to sell the land.
2. When S. sells land for another, and is himself, together with the attorneys of the principal, the principal purchasers of the lands at such sale, and when also, such agent and attorneys take an undue advantage or interest from such sales; *Held*, that it is no error in the Court, on the trial of suit brought for the recovery of the lands, to charge the Jury that plaintiffs were not bound by that sale if there was any fraud in it; at least, the facts would warrant this charge.

Ejectment in Laurens Superior Court. Tried before Judge HANSELL at the April Term, 1860.

This was an action of ejectment, commenced on the 19th of March, 1855, in favor of John Doe on the demises of Eason Allen, William, Oliver, and William Spell and John C. Spell, against Richard Roe, casual ejector, and Temperance Kellam, tenant in possession, for the recovery of "a tract of land, part arable, and part wood land, situated in the county of Laurens, in the settlement known as the Buck-eye settlement, on the waters of Buck-eye Creek, in said county, formerly known and distinguished as the Russell Kellam mill lands, and adjoining and bounded by lands formerly owned and possessed by David Culpepper, Mr. Jones, John C. Spell, David Blackshear, C. S. Guyton, John C. Culpepper and Echols Hightower, containing six hundred and eighty-one acres, more or less, and described in a deed, made by Matthew Smith, to Russell Kellam."

To this action, the defendant set up the plea of the Statute of Limitations.

At the October Term, 1857, and after one trial of the case had been had, a rule of survey, was granted by the Court, directing the premises in dispute, to be surveyed by Jacob J. Linder, the County Surveyor, upon due notice to the parties, and a plat of the survey to be returned according to law.

On the trial of the case on the appeal, the following testimony was adduced, to-wit :

Evidence for the Plaintiff.

1. The Will of William Oliver duly proven and recorded on the 9th of June, 1828, the provisions of which, are as follows :

"I give and bequeath unto my beloved wife, Abigail Oliver, two feather beds, bed steads and furniture ; one negro woman, Silvia ; one grey horse, and one bay mare ; four cows and yearlings ; all the glass and crockery ware, kitchen furniture, two chests and two tables ; also the land, mill and plantation where we now live, to be hers during her natural life, and after death, to be divided between William Spell, and John Cuddy Spell.

"I also desire and request, that all my property, real and personal, be divided between William Spell and John Cuddy Spell.

"I also desire and request, that my executors will immediately sell all my perishable property.

"I also desire and request, that my executors will dispose of my lands as they think proper for the benefit of William Spell and John Cuddy Spell, except what is bequeathed.

"I also desire and request my executors to pay and discharge all the debts due from me, and the remainder of my debts due me, to be put to the benefit of William Spell and John Cuddy Spell, they being the offspring of my wife Abigail.

"I also desire and request my wife Abigail Oliver, and my brother McDaniel Oliver, to be my executrix and executor."

2. Sumner Adams, in answer to interrogatories, testified :

That he had been well acquainted with the woman, who was always said by her relations and acquaintances, to be the widow of William Oliver of Laurens County, deceased ; her name was Abigail ; after Oliver's death she married Matthew Smith ; she is now dead : she died, to the best recollection of witness, in the month of August or September, 1852 ; she has two sons living, viz : William Spell, and John C. Spell.

3. Two receipts, each of which were in the following words, to-wit :

"Receivd, 5th Mareh, 1832, from Mathew Smith, in behalf of himself and John and William Spell, seven hundred

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and twenty-one dollars, the same being our portion, arising from the sale of lands in which we were entitled to the amount of one-fourth; the same being deducted from the amount of a decree in Twiggs Superior Court, wherein they were plaintiffs, and the administrator of McDaniel Oliver was defendant named.

WILLIAM H. TORRANCE,

For himself and Richard H. Long."

4. JOHN SMITH testified: That he had known the land for twenty-five or thirty years; he knew the lines and boundaries, and showed them to Jacob T. Felder, the Surveyor; the survey made by him is very near, if not exactly correct; the defendant, Mrs. Kellam, and those under whom she holds, have had peaceable possession of the land, to which he showed the lines, under a deed from Matthew Smith to Russell Kellum; Kellam went into possession at the time some twenty or thirty years ago; there are twenty or thirty acres in cultivation, which is worth for rent one dollar per acre, per annum; the land was known as the William Oliver mill tract; it is the place whereon William Oliver lived when he made his Will, and on which he died; it does not lie on Buckeye creek, but on the mill creek near by, and a tributary of Buckeye creek. John C. Spell and William Spell were regarded as the children of William Oliver; they were illegitimates. William Spell was about five or six years old, and big enough to ride on horse back alone, and rode about a good deal. John C. Spell, his younger brother, was old enough to ride behind his father when they first came to the neighborhood, which was about 1811. Oliver lived there four or five years before he died, which occurred in 1811, or 1812; he knew nothing of the sale of the land by the executrix of Oliver; Spells lived in the settlement with Matthew Smith, at the time of the sale to Russell, and must have known of said sale, and must also have known of the sale by the executrix, if there was one, for they lived with Smith in the settlement, and he never heard of any objection to the sale on the part of the Spells. Witness is a brother of Matthew Smith, and lived near by him, and the two Spells, when Smith sold the land to William. The Scarborough lot is a different one from the Oliver mill lot.

5. JACOB T. FELDER testified: That he surveyed land of which the plat in Court is a representation; he knew nothing of the lines or corners, except as shown him by John Smith.

The mill is over the creek, and not on either side; he made it out two hundred and forty-seven acres: he knows nothing of it being the Oliver mill track alluded to, except from the sayings of Smith and others; he gave to his son what he supposed was a notice of the survey, to be served on Mrs. Kellam, but does not know whether it was served or not; supposes that the copy notice was not signed, as the original was not. On the day of the survey he went by Mrs. Kellam's, and she spoke as if she were looking for witness and expecting the survey. I asked her for her title papers, and she said the surveyors had them; he asked her son Seth in her presence to go with him on the survey, but he declined on the ground of other engagements. Mrs. Kellam did not object to the survey being made, and her son in her presence signified his anxiety for the survey to be made, in order that the law-suit might end. Mrs. Kellam's son Seth was living with her and attending to her business; the land that witness surveyed, was not on Buckeye creek, but on Kellam's mill creek, a tributary of Buckeye; it adjoins lands of C. S. Guyton, Mrs. Kellam, and Hamilton Smith; there are about thirty acres in cultivation, and worth for rent one dollar per acre, per annum.

6. WILLIAM H. MARTIN testified: That Temperance Kellam was in possession of the land in dispute, at the date of the service of the writ, viz: March 21st, 1855; that she had been in possession, cultivating it, since 1862; that she is still in possession; that there are twenty or twenty-five acres cleared, which are worth for rent per annum, one dollar per acre.

Evidence for the Defendant.

1. The following agreement, to-wit:

GEORGIA, LAURENS COUNTY:

This memorandum of an agreement between William Spell, John Cuddy Spell, and William Smith, in right of his wife, Abigail Smith, late Abigail Oliver, heirs and legal devisees of William Oliver, deceased, of the one part, and Abigail Oliver, executrix of the Will of said William Oliver, witnesseth: That for the purpose of hastening the division of said estate, and to save the expenses usually attendant on the proceedings in dividing estates, or of obtaining an order of sale, the parties of the first part do by these presents agree, that the said executrix shall proceed to sell all the real estate of the

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deceased, so soon as may be practicable, in such manner as shall be most consistent with the interest of said estate, ratifying and confirming the acts and deeds of the said executrix in the premises, as fully as may be in our power as devisees of said estate.

Signed, sealed, and delivered, this the 21st October, 1828, in the presence of Daniel Culpepper.

WILLIAM ^{his} ✕ SPELL, [L. S.]
mark

JOHN C. ^{his} ✕ SPELL.
mark

MATTHEW SMITH.

On the back of said agreement was written the affidavit of Daniel Culpepper verifying its execution, which affidavit was dated the 4th of February, 1829.

On the back of the agreement was also written the following, to-wit :

“I consent to the agreement within so far as I am interested in the land, upon the receipt of one-fourth part of the proceeds of the sale of said land.”

“October 24th, 1828.”

RICHARD H. LONG, [L. S.]

2. The following written memorandum, or statement, to-wit :

GEORGIA, LAURENS COUNTY :

March 1st, 1828, received of Matthew Smith, William Spell, and John C. Spell, a deed of indenture for one-fourth part of the lands belonging to the estate of William Oliver, deceased, as a fee for services to be rendered in the recovery of the lands of said estate. If the lands are not recovered, I have no right to hold or claim upon them for any remuneration for such services rendered ; but my right to fee is dependent upon the recovery of the lands.

R. H. Long, of Laurens.....	432
Matthew Smith.....	643
John Spell.....	810
Long & Lawrence Morgan.....	1,000
Dunbury tract.....	400

3,285

MILLEDGEVILLE, NOVEMBER TERM, 1860. 549

Roe et al. vs. Doe et al.

Long & Lawrence interest.....	82—125
Amount purchased by Long and Lawrence.....	1,432 00
Cash received by Long.....	26 00
	<hr/>
	1,458 00
	821 25
	<hr/>
	636 75
• Smith and Spell's note to R. H. Long.....	157 25
	<hr/>
	479 50
	29 56
	<hr/>
	449 93
Credit by R. H. Long.....	72 23
	<hr/>
	377 70

3d. Richard H. Long, in answer to interrogatories testified :

That the foregoing agreement was written by him, and signed by William Spell, John Spell and Matthew Smith, in his presence, and that the consent written on the back of the agreement was written and signed by the witness; that, pending the negotiations relative to the agreements and the subject matter of them, the witness was particular in making inquiry as to the ages of the two Spells, and especially of John C. Spell, and was answered by them and their mother, in positive terms, that they were both of age. John C. Spell (his brother William being present) was the first to consult with witness in the case that led to the arrangement stated in the agreement, and he stated to witness, that his uncle, McDaniel Oliver, was endeavoring to cheat them out of their land. Witness then told them, and afterwards again told them, and Matthew Smith, that their claim to the land could not be sustained, unless there was a will of William Oliver to sustain it. To this, Smith replied, that he believed there was a will. A few days afterwards, witness visited Mrs. Smith, wife of Matthew Smith, and mother of the two Spells, at her request, and also, at her request, examined some papers, among which was a will—this was handed to witness. In all the transactions, both before and after the agreement was signed, the Spells were prominent, especially John C. Spell, who was the most intelligent. So far as witness knows,

Roe et al. vs. Doe et al.

they never disputed the genuineness of the agreement; but, on the contrary, acknowledged its validity, and acted under it. Both gave powers of Attorney to Smith, to sell the lands in furtherance of the agreement; and when Smith wanted to take the mill place, at a valuation to be fixed by two disinterested valuing agents, John C. Spell objected, saying that he wanted the land sold at public sale, because persons who wanted it, would give more for it than it would be valued at. The Spells were present at the sale of the lands in Laurens, and each of them bid at the sale. William Spell bid for one tract only, but John C. Spell bid for each tract, and was the purchaser of one. The lands sold under the agreement in Laurens county, were the mill tract—then known as the Matthew Smith mill tract—the Scarborough tract, the Vicker's or Brazille tract. When the mill tract was put up, Mrs. Smith said she was entitled to that during her life; but John C. Spell desired it sold at once; and witness, on being asked, gave it as his opinion that John C. Spell's proposition was a fair one; as all were let into an equal interest in the land under the agreement, it was just that the Spells should receive their part of the mill tract at once. This was agreed to—Mr. and Mrs. Smith both saying that it was right. The sale was not objected to by either of the Spells, but both of them said to the witness, then and afterwards, that they were satisfied. The memorandum or statement aforesaid, dated 1st March, 1828, was written and signed by the witness. The deed therein mentioned was a conditional deed, and was given to William H. Torrance, Esq., to settle with Smith and the Spells; since which, the witness has not seen it, and does not know where it is. The other statement in writing and figures was written by the witness and handed to Torrance, also to be used in the settlement with Smith and the Spells. The entry of "R. H. Long, 432," was to show that the land, to-wit: the Vicker's place, bought by witness at the sale, was bid off by witness at \$432. The entry, "Matthew Smith, 643," was to show that the mill tract was bid off by him at \$643. The entry of "John C. Spell, 810," was to show that he bid off the Scarborough place at \$810. The same may be said of the other entries. As to the settlement with Smith and the two Spells, it was made by Col. Torrance, counsel, and not by witness. Witness will not be gainer or loser by the event of this suit. He cannot give the boundaries of the land, though he knew it well twenty-five or thirty years ago.

4th. A power of Attorney, dated 4th of February, 1829, made and executed by John C. Spell, empowering Matthew Smith to sell and convey the part of said John C. Spell in the lands belonging to the estate of William Oliver, deceased, as well as all interest belonging to said Spell in such lands, under the will of the said deceased.

5th. A similar power of Attorney, dated the 2d of February, 1829, from William Spell to Matthew Smith, for a similar purpose.

6th. A deed from Matthew Smith to Russell Kellam, dated the 4th of July, 1834, and recorded the 11th of August, 1834, conveying "six hundred and eighty-one acres of land lying in Laurens county, adjoining lands of David Culpepper, John Livingston, Mr. Jones, John C. Spell, David Blackshear, C. S. Guyton, John C. Culpepper and Echols Hightower, it being part of 500 acres granted to William Blount, by Governor Matthews, on the 16th of February, 1787, and part of 287½ acres granted to William Carroll, by Governor Houston, on the 16th of September, 1787; and also, part of a tract of land granted to Reuben Wilkinson, by Governor Handly, of the 28th of May, 1788, all lying on the waters of the Buckeye creek."

7th. A deed from John C. Spell to Russell Kellam, dated the 2d day of January, 1836, and recorded the 6th of March, 1844, conveying "certain tracts of land, lying on Buckeye creek, and the waters thereof, in the county of Laurens, containing four hundred acres, more or less; one tract of 300 acres, granted to William Scarborough, by Governor Telfair, on the 22d of February, 1785; also, one hundred acres granted to said Scarborough, by Governor Milledge, on the 26th of August, 1805."

Upon this testimony, the Jury returned the following verdict, to-wit:

"We, the Jury, find, for the plaintiff, the premises in dispute—that is to say, two hundred and forty seven acres, more or less, according to the rule of survey to us submitted—being a tract of land situated in Laurens county, on Kellam's Mill creek, a tributary to Buckeye creek; beginning at Guyton's corner, on the James Perry Branch, running South 61° West 71 chains, crossing the Darien road, near Cincinnatus S. Guyton's house, to a stake corner; thence, North 29°, West 54 chains, crossing said mill creek, to the head of a

branch near the old place of residence of the plaintiff, John C. Spell; thence, North 61° , East 71 chains, crossing the said Darien road near the defendant's house, to an old road; thence, South 29° , East to the main prong of said Mill creek; thence, down the meanderings of said creek to the high-water mark of the mill pond on the same; thence, up the meandering of the said James Perry Branch, to the beginning point. We further find, for plaintiff, two hundred and twenty-five dollars for mesne profits, with cost of suit."

Counsel for defendant then moved for a new trial of said case, on the following grounds:

1. Because the Jury found contrary to law and the charge of the Court, as to the assent of the plaintiffs to the sale of the land.

2. Because the Jury found contrary to the evidence and the weight of the evidence in the case.

3. Because, whilst the Court was right in charging the Jury, "that if the two Spells were present, agreeing to a public sale of the lands in dispute, bidding for it, and encouraging others to bid for it, and setting up no claim to it at the sale, nor objecting to the sale, they were bound by that sale, and could not recover the land," he erred in adding, "unless there was fraud in the sale," as there was no evidence, either direct or circumstantial, of any such fraud. And when the Court had so charged, counsel for defendant requested the Court further to charge the Jury, "that fraud could not be presumed, but must be proven," which was done; but the Court again erred in adding: "But that fraud might be proven by circumstances, as well as by positive evidence; and that, in looking into the case, the Jury might connect all the facts and circumstances together, as well as the relationship, to determine if the sale was a fair and *bona fide* transaction," as there were no circumstances in the case from which the Jury could reasonably infer fraud in the sale of the land to which their minds were thus directed by the charge.

The presiding Judge overruled the motion, and refused the new trial, and this decision is the error alleged in this case.

WARREN & GOODE, for plaintiff in error.

JOHN R. COCHRAN, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

This was an action of Ejectment in Laurens Superior Court, for the recovery of a tract of land, known, originally, as the Oliver Mill tract, in which John C. and William Spell were plaintiffs, and Temperance Kellam, widow of Russell Kellam, deceased, was defendant.

The land in controversy belonged, originally, to William Oliver, and was, by him, by his last Will, devised to his widow, Abigail, during her life, and, at her death, to his two sons, John C. and William Spell. The testator, Oliver, executed this Will in the year 1811, and died soon after. His widow intermarried with Matthew Smith, and died in 1852. The Will was not produced, or admitted to probate, until the year 1828, after the marriage of testator's widow with Matthew Smith. Upon this, the plaintiffs rested their right to a recovery of the premises.

The defendant relies on the following facts to defeat their right: that this tract was sold at public outcry, in the county of Laurens, and bought, at that sale, by Matthew Smith; that the plaintiffs were present at that sale, and not only did not object thereto, but assented, by bidding for the land, participating in the sale, and receiving the benefit thereof; that all the balance of the land of the testator, Oliver, in that county, Laurens, was sold at the same time—plaintiffs being also present, bidding on all and buying one of the tracts; that they then were of age; had previously agreed, in writing, that the executrix should sell the land in that way; that each of them, one on the 2d and the other on the 4th of February, 1829, appointed Matthew Smith, Attorney in fact for them, and, in their name, to sell their interest in these lands; that Matthew Smith bid off this tract at \$432, and complied with the terms of sale so far as to account for that sum in the division of the proceeds of sale, under the agreement, which seems to have been that the lands the plaintiffs became entitled to, under the Will of Oliver, should all be sold, and the proceeds divided into four parts, one to the lawyers, one to Matthew Smith, and one to each of the plaintiffs. The reasons for this extraordinarily liberal agreement on the part of the plaintiffs do not appear. The only interest that Matthew Smith had was the life-interest of his wife in one of the tracts; and, by this agreement, if it could be enforced,

he not only retained that interest, but would get the entire fee, and as much money as the fee simple of the tract brought at the sale.

This sale, together with its terms and circumstances, are proven by Richard H. Long, one of the Attorneys who received one-fourth part of the proceeds of the sale. There was no deed executed for the lands so sold to the purchasers at that sale, nor any memorandum thereof signed by the party making the same. The evidence does not show when the sale was had, but the indications are, that it must have taken place in the year 1828, or 1829—most likely in 1829, after the execution of the letters of Attorney from the plaintiffs to Matthew Smith. In 1834, Matthew Smith sold and conveyed this tract of land to Russell Kellam, under whom the defendant claims.

Upon these facts, counsel for defendant insists, that the sale and purchase, by Matthew Smith, in 1828, or 1829, testified to by the witness Long, divested the plaintiffs of the title thus acquired under the Will of Oliver—or rather, that, as they were present at that sale, assented to it, bid for the land, and received the benefit of it, they are estopped from setting up their title against such sale.

The Court below, in charging the Jury, gave the defendant the benefit of this principle; but counsel insists, that the qualification made, to-wit: "that the plaintiffs were bound by that sale, unless there was fraud in the sale," was erroneous, because there was no evidence of any fraud; and that is the error complained of. We propose, first, to inquire, whether the plaintiffs were estopped, by that sale, from asserting their title to the land against the defendant? And, secondly, whether the qualification made by the Court, as to the fraud in the sale, was justified by the evidence?

1. Were the plaintiffs estopped or bound by the sale? We are clear that they were not. The insurmountable difficulty to the application of that principle, under the facts, is, that whatever, in fact, was agreed to be done, or was done, there was no deed made, or any memorandum in writing, of the sale, by anybody, as evidence that there was a sale, by which the plaintiffs could be estopped or barred of their title to these lands. The plaintiffs agreed, in writing, on the 21st of October, 1828, that the executrix should proceed to sell all the real estate of the deceased. It does not appear that she

ever done so. They subsequently appointed Matthew Smith their Attorney, with power to sell their interest in all the lands, for them, in their name, and to make their title. It does not appear that he ever did so. Had he, there would have been no difficulty. The reliance is on a public sale, on a sale day, at which the plaintiffs were present, bid and got the benefit of the sale, and at which Matthew Smith bought this land; but by whom the sale was conducted, or the particular time it took place, is left to conjecture. Now, if a title had been made by the person who conducted that sale, no matter who that was to the purchaser, these plaintiffs being present, assenting to, and participating in, that sale, then, they would have been bound thereby—they would have been estopped, but this was not done; and to say that a title to lands can be created or passed in this way, is to run directly in the teeth of the Statute of Frauds. Matthew Smith was the purchaser, and the defendant has his title, stands in his place, and is in no better condition than if the contest was between plaintiff and Smith. Now, suppose the contest was with Smith, under these facts, in what better condition would he be, if the plaintiffs had agreed, directly, to sell him the land at \$532, and this sum was paid into their hands, no title or deed of any kind being made, or the contract reduced to writing? This would be equally as strong a case, if not stronger; yet, it would not pass the title. The plaintiffs would not be bound by it. It could not be enforced, even in Equity, and why? For the simple reason that the contract was not in writing. What is the difference between this case and that? Does not the defendant have to depend upon the recollections of witness, after the lapse of more than thirty years, to prove not only that the plaintiffs were present, participating in, and assenting, but there was, in fact, a sale, and that the terms were all complied with. These are things that the Statute intended to provide against, and, we think, effectually so.

It is not pretended that the deed made by Smith, in 1834, to Kellam, was in execution of the powers of Attorney.—Those powers cannot aid the defendant's title, for the reason that the deed does not purport to be made in execution thereof. Nor is it pretended that Kellam bought from Smith, or was induced to do so upon the representations or acts of the plaintiffs, that the title was in him. If that was true, the case would be very different, for then the principle would ap-

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ply, which is contended for by the defendant; but it is not so, for we looked carefully and anxiously into the record for some evidence of that fact, and we could find nothing to warrant the conclusion. We are forced to conclude that the plaintiffs were not estopped or bound by the sale, if one was ever made.

2. Suppose, however, that we should be mistaken in this view, still the defendant has not been injured, for the Court below, taking a different view to ourselves, gave her the benefit of the principle for which she contends, subject to the qualification that the plaintiffs were not bound by the sale, if there was any fraud in it. And we think that the facts not only authorized, but required that charge. The executrix of the Will suppressed the existence of such a paper from the knowledge of these plaintiffs from 1811 to 1828, and until the lands were involved in litigation, her title disputed, and about, perhaps, to be lost, for the want of a Will. When it was produced, a ruinous and unjust agreement is made with them, by which they are deprived of one-half their lands, without any consideration or corresponding benefit to them. Those persons who stood in a confidential relation towards them, such as Matthew Smith and his wife, representing the Will, and the counsel of these plaintiffs, whose duty it was to look after and protect the interest of these plaintiffs, were themselves the principal purchasers of the lands, when, legally, they could not buy, because, by becoming bidders, themselves, their interest, as purchasers, to get the lands as low as they possibly could, conflicted with their duties to their clients to make the land sell for as much as it was worth. Surely, if a sale so made was not open to the enquiry of fraud, on the facts stated, it would be difficult to find one that was. In no view that we can look at this case, can we see any reason for disturbing the verdict of the Jury.

JUDGMENT.

Therefore, it is considered and adjudged by the Court, that the judgment of the Court below be affirmed.

STROZIER vs. CARROLL.

1. The rule of Law is, that the credibility of a witness is a matter to be determined by the Jury.
2. There being but one witness to a material point in a case, and he standing self-contradicted before the Jury, a new trial will not be granted, because the Jury found against his evidence. *

Assumpsit, in Thomas Superior Court. Tried before Judge HARRIS, at the June Term, 1860.

This was an action brought to recover damages for the alleged breach of a warranty, that a certain slave, sold by the defendant to the plaintiff, was "sound and healthy."

The following testimony was adduced upon the trial of the case in the Court below, to-wit:

ISAAC JOHNSON, in answer to interrogatories exhibited by the plaintiff, testified as follows: I was present at the house of the plaintiff, on the 28th of February, 1857, when the defendant sold to the plaintiff a negro girl by the name of Silvia, whom I judged to be fourteen or fifteen years old; the girl was valued, by defendant, at nine hundred dollars, and the plaintiff, in the trade, let the defendant have a negro man valued at one thousand dollars, and the defendant was to pay him one hundred dollars to boot; the girl was hoarse, had a bad cough, and complained of a pain in her side; the defendant represented her as sound, and said that she had got wet, and had taken a bad cold; I understood, from the conversation, that the plaintiff was trading for the girl for the benefit of James Scarboro, and that bills of sale were not to be passed until it was ascertained whether or not Scarboro was pleased with the girl; the defendant said he would be there again in two or three weeks, at which time written bills of sale were to be executed; I was the plaintiff's overseer at the time of the trade; in two or three days after the trade, the girl was sent to the field to work, and plowed about one-half hour, and complained so much of a pain in her side, that I set her to picking up trash; finding that she could not do that, I sent her to the house and she was not able to work in the plantation afterwards; the girl was not well at any time during her stay at the plaintiff's; she com-

Strozier vs. Carroll.

plained, was unable to work, and died in about one month after the trade; Drs. Bledsoe and Twitty were called in by the plaintiff to see the girl whilst she was sick; pending the trade, and both before and after it was confirmed, the defendant represented and warranted the girl to be sound, and with the understanding that the girl was warranted to be sound when the trade was confirmed; the girl was worth nothing; if she had been sound, as the defendant represented her to be, she would have been worth nine hundred dollars; I was well acquainted with the negro girl, being at the time the plaintiff's overseer; I now live with J. R. Scurry.

The same witness, in answer to interrogatories exhibited by defendant, testified as follows:

That he was at the house of plaintiff in March, 1857, he thinks, and the measles prevailed at the time amongst plaintiff's negroes; that he was not present when the trade was made for Silvia, but the defendant said she was a sound negro; he does not know what was said about another negro, but the other negro was sold as a sound negro; defendant had two negroes with him; Silvia took the measles after plaintiff bought her; she died; she was kept in Mrs. Strozier's room, and treated well all the while; she had a cough when she first came there, which continued with her until she died; she got up with the measles so she could get about; he does not know positively of what she died; it might have been measles, and it might have been something else; the trade was made the 27th of March or February, he does not recollect which, and the girl was taken sick the fifth day after she came there; she was unwell when she came, but did not get down until the fifth day thereafter; he thinks she was down ten or twelve days before she died; he overseed for plaintiff in Baker county, lived in the same house, and saw the negro nearly every day, and also heard plaintiff and family talk about it; whilst the negro was down sick, she complained mostly of her side; the girl was valued at one thousand dollars, as he understood from both parties; the defendant said there was nothing the matter with the girl; this was said after the trade was made; no bill of sale was made, but he now forgets the reason; he took the girl to be sound, but discovered that she had a cough while the defendant was there; she was puny from the time she came, and so continued until she died, complaining mostly of a pain in

her side; the reason he took her to be a sound negro was, because the defendant said the cough was only the effect of getting wet; if the negro had been sound, she was worth one thousand dollars, but in the puny condition in which she continued from the time of the trade, to the time she was taken down, she was worth very little, and the difference in value would have been nearly the thousand dollars, if her puny condition was owing to unsoundness.

The same witness being introduced in open Court, testified as follows: That he was present at the house of plaintiff, in Baker county, the last of February or the first of March, 1857, when the defendant came there with two negroes: one, Silvia, a dark-brown, about fourteen or fifteen years old, and the other a smaller mulatto girl; the parties made an exchange of negroes; Strozier let Carroll have a negro valued at one thousand dollars, in the trade, and Carroll let Strozier have the girl Silvia, valued at nine hundred dollars, and that Strozier was to pay Carroll one hundred dollars to boot. The witness, on being again asked the question, said Strozier was to pay one hundred dollars to boot. Mr. Strozier stating that he was mistaken, the witness, after some reflection, said: He believed it was Mr. Carroll who was to pay the boot, and that he was confused when he made the first statement, and that it was a mistake; that the trade was begun one evening, but not consummated until next morning; during the negotiation, Carroll said the negro was sound, and that he warranted her in body and mind; Strozier called his attention to a cough she had, and to the complaint she made of a pain in her right side, and Carroll accounted for it by saying that she had taken cold, from a wetting she got a day or two before; the witness was living with the plaintiff that year as an overseer; a few days after the trade was made, Silvia was sent to the field to work; he put her to plowing, and being too unwell for that, he put her to picking up trash, but she was too unwell for that also, and she was then sent to the house, where she continued sick until she died; she was well nursed and attended to during her illness, being kept in Mrs. Strozier's room, and a negro girl taken from the field to wait on her; every time he was about the house she was kept in that room, and attended by Mrs. Strozier and the negro girl; Drs. Bledsoe and Twitty were called to attend her; Dr. Twitty did not get there until the night she died; measles

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were in Mrs. Strozier's family at the time; one negro girl then had it, and another took it afterwards; they were kept separate and apart; Silvia did not have the measles; there was a *post mortem* examination by Dr. Bledsoe; in the morning when the trade was concluded, it was agreed that Mr. Carroll should return in two or three weeks, and execute a bill of sale to Silvia, and receive a bill of sale for the negro man; the reason for the postponement was, that Strozier had the negro man to sell for Mr. Scarboro, on commission, and that he wanted to see him to get him to make the bill of sale; Carroll never returned; witness lived there all the year; his interrogatories have been twice taken in this case—once for the plaintiff and once for the defendant; the first set, for the plaintiff, were taken by ———; the second set, for the defendant, were taken by Bonner and others, as commissioners; Carroll applied to witness for his interrogatories, and he declined to give them; he consulted with Mr. Slaughter, an attorney, who advised him that, as his interrogatories had been once taken in the case, they could not be taken again, and witness continued to refuse; Carroll came to see him for the purpose of getting the second set executed; brought a bottle of liquor with him; took him to Newton; the liquor was drank up by the time they got to Newton; Carroll went first to the grocery to have the bottle replenished, and gave witness to drink, which he did freely; the interrogatories were not then executed, because he refused, upon the advice given him by Mr. Slaughter; afterwards witness was arrested by the Sheriff and carried from the place of his residence, six or eight miles to Newton, to the office of Mr. Solomon, where they were taken by Bonner and others; witness was drunk at the time they were taken; he can neither read nor write, and if he swore what he is represented to have sworn in that set of interrogatories, it is not true; if there is any conflict or discrepancy between the contents of the interrogatories taken at the time he was drunk and the first set of interrogatories taken when he was sober, the first contain a true statement of the case, and not the second set; he now attends Court, in person, at the request of the plaintiff, Mr. Strozier, who promised to pay his expenses here, and to pay him for his time; Mrs. Strozier had the negro, Silvia, in her room all the time she was sick, and witness knows that Mrs. Strozier and the negro girl attended her all the time; did not

see Mrs. Strozier and the waiting negro only when he was about the house at meal times, and then not all the time he was there; does not know that they were waiting all the time, but they were when he was there; he was in the habit of remaining in Mrs. Strozier's bed-room when about the house; he was most of his time in the field; it was his custom to go to the field before breakfast, and remain there until breakfast time; but on the morning Carroll and Strozier were trading, he did not go to the field, but remained at the house, and was with them all the time until Carroll left, about 8 or 9 o'clock; Carroll sued out a process to compel him to testify a second time; the officer came to Mr. Scurry's, where he was then overseeing, about 12 o'clock in the day, and he went with the officer to the house and ordered a boy to catch his horse, and from Scurry's he went to town with the officer, to Mr. Solomon's office, where his interrogatories were taken a second time; he remembers that Mr. Bonner, Mr. Montgomery and Mr. Hunt acted as the commissioners in taking his interrogatories; Mr. Bonner is a gentleman of high character in Baker county; the witness could walk and talk, but was drunk; Mr. Solomon was the man who sued out the process for Mr. Carroll, to compel him to testify; Strozier, with others, was present in the room part of the time, when the first set of interrogatories were executed; he came down here with Strozier, upon Strozier agreeing to pay his expenses and usual hire per day; Strozier did not say anything at all to him about the case.

DR. BUSHROD BLEDSOE, in answer to interrogatories exhibited by the plaintiff, testified as follows: I am a practicing physician, and, during the year 1857, was called in by the plaintiff to see a sick negro girl, who was about fourteen or fifteen years old, weighing about one hundred and ten or fifteen pounds, of a complexion rather brown, between brown and black, and whose name, to the best of my recollection, was Silvia; she had an abscess of the right lung, and also caries of the rib; she had a bad cough when I first saw her, and complained of a pain in the right side; her respiration was considerably hurried, and she had some fever; I examined her lungs and found them seriously injured; she died on the 31st of March, 1857, at the house of plaintiff, in a good, suitable room, and under careful attendance and treatment; I made a *post mortem* examination of said negro girl:

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I took out the lungs and cut open the right lung, and found a large abscess; the entire lung was affected so much, that when I put it in water, it sank as readily as if it had been a solid piece of flesh; there was not a bronchial tube to be found but what was entirely closed up, and there was a large quantity of puss or matter in the cavity of the chest; I found the ribs seriously affected with caries, whilst the left lung was almost entirely gone, which was the result of former disease; she was designated by the family as the Carroll negro, and I think, from the examination I made, that she must have been diseased at least three or four years; I was called to see her on the 30th of March, 1857, and understood that she had been confined to her bed some three days; I visited her twice, and on the second visit she was dead; I made the *post mortem* examination at the instance of the plaintiff, who was moved to have it done by Dr. William Twitty, who was present when the girl died; the examination was made the 1st of March, 1857, in about twelve hours after she died; I had no professional assistance in the examination; the plaintiff had no other negroes sick at the time I attended Silvia, that I know of.

WILLIAM McLENDON testified: That in the latter part of December, 1856, or the first of January, 1857, he bought from Carroll a negro girl, by the name of Silvia, at seven hundred dollars, and in the latter part of February, 1857, he sold her back to Carroll for eight hundred and seventy dollars in notes, on which he afterwards realized the money; Carroll told him, at the time he bought her from him, that she was a dirt-eater, as he had been informed, but that during the two months that he (Carroll) had owned her, she seemed to be sound and healthy; when he sold her back to Carroll, he (Carroll) left on the road in the direction of Baker, with the girl, Silvia, and a small yellow girl; witness took no warranty from Carroll when he bought Silvia, and gave none when he sold her back to Carroll; the girl, Silvia, was worth about seven hundred dollars in money.

Mr. SIBLEY testified: That he was acquainted with the character of Isaac S. Johnson, in the neighborhood in which he resides for truth and veracity, and would believe him on his oath in a Court of Justice; Johnson is in the habit of getting drunk, and when so, he is a "*harem scarem*" sort of fellow, not caring much what he says or does; but when

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sober, witness would believe him as soon as any man; witness remained over to-day, at Mr. Strozier's request, to testify as to Johnson's character for truth; witness is Strozier's brother-in-law; he never heard Johnson's neighbors speak of his veracity, but bottoms his opinion on his own knowledge of Johnson's character.

Under this testimony, after argument had, and after the charge of the Court, the Jury returned a verdict for the defendant.

Counsel for plaintiff then moved for a new trial, on the following grounds:

- 1st. Because the verdict is contrary to Law.
- 2d. Because the verdict is contrary to evidence.
- 3d. Because the verdict is manifestly contrary to the weight of the evidence, and without evidence.
- 4th. Because the verdict is contrary to the charge of the Court.

The presiding Judge overruled the motion and refusal to grant a new trial, and this refusal is the error assigned in this case.

J. R. ALEXANDER, for plaintiff in error.

McINTYRE & YOUNG, for defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

This is an action to recover damages, alleged to have resulted from a breach of a warranty of soundness on the sale of a slave, who afterwards proved to be unsound. The case turns upon the fact of warranty. There was none in writing, and but one witness testifies to this point. This witness testified three times in the case—twice by depositions under commission, and once from the witness' stand in open Court. This testimony, as given on each occasion, was before the Jury. Looking to it as delivered on the first and last occasions, there was evidence of a warranty; looking to it as delivered on the intermediate occasion, there was no evidence of warranty. Twice he swears he was present when the trade was made; once he swears he was not so present. This witness stood before the Jury self-impeached. It is very manifest, they discredited him. The rule is, that the credibility

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of a witness is a question for the Jury. How can it be otherwise, when the object of his testimony is to produce conviction on *their* minds. Conceding, for the argument, that there may be exceptions to the rule, cases of credit denied to witnesses, by the Jury, so flagrantly wrong, as to require the interposition of the Court, (as I am disposed to hold,) we think this is not such a case. The Judge who presided on the trial, refused, upon motion made, to disturb the verdict, and this is the error assigned. Believing he committed no error, we affirm the Judgment.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

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1. The payment of money by one executor into the hands of a co-executor on notes given by himself to the other for the purchase of property belonging to the estate sold by the co-executor, is not such an act, of itself, as will charge such executor with the subsequent waste or misapplication of the funds of the estate by the other executor.
2. When two are liable, and the creditor takes the note of one, extending the time of payment, the other is thereby discharged from further liability.
3. That a note was given as a payment, and not as a mere memorandum, may properly be inferred from a receipt given therefor, in which the note is treated the same as money paid at the same time, and from the fact that two and a-half years elapsed before any attempt is made to treat it other than as a payment.

In Equity, in Morgan Superior Court. Tried before His Honor Judge HARRIS, at the September Term, 1860.

On the 5th day of September, 1853, Albert O. Mosely, his

wife, Mary Jane Mosely, and Ann Eliza Mosely, filed their bill in Equity, in Morgan Superior Court, against John J. Floyd and others, in which, among other things, they alleged:

That in the year 1838, John Floyd, then of said county of Morgan, departed this life, leaving, unrevoked and in full force, a will, in which Stewart Floyd, and the said John J. Floyd, were nominated executors; that the Will was duly proven and recorded, and the said executors were regularly qualified as such; that the *fourth* item of said Will is as follows, to-wit: "It is my desire that all of the balance of my property of which I am possessed, or of which I may die possessed, both real and personal, be sold; out of which, I first desire that all my just debts be paid, and out of the money remaining after the payment of my debts, I give to my sons, Stewart and John J. Floyd, the sum of five thousand dollars to be held by them, or kept out in safe hands at interest, and it is my will and desire that the interest accruing annually from said sum of money be annually paid over to my beloved wife, Mina, by my said sons, for her comfort, support and maintenance, during her natural life or widowhood, and at her death, or marriage, it is my will and desire, that said sum of five thousand dollars be divided among my children, in the following manner; Mary Alford, Stewart Floyd, Martha Reese and John J. Floyd each one share, &c., &c."; that the same item gave four other shares of said five thousand dollars, after the death or marriage of said Mina, to four other children in trust estates; that by a codicil to said Will, the testator, after reciting that the said Martha Reese, wife of Thaddeus B. Reese, had died subsequent to the making of said Will, bequeathed unto the complainants, Ann Eliza and Mary Jane, daughters of the said Martha Reese, one share of his estate between them, to be held in trust for them by the said Stewart and John J. Floyd, until the said Ann Eliza and Mary Jane married, or attained the age of twenty-one years, and then to be paid them, with interest; that said bequest in favor of the said Mina depended on the condition, that she did not elect to take her dower; that it was the testator's intention that the complainants, Ann Eliza and Mary Jane, should have and enjoy a full share of his estate, in the place of the said Martha Reese, their mother, and the said Mina Floyd having failed to elect to take her dower in the lands of the testator, the female complainants have a vested

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remainder in one-eighth part of said five thousand dollars, with interest thereon from the year 1838; that the complainants have never had a final settlement with the said executors; that the complainant, Ann Eliza, having previously intermarried with one William Johnston, jr., her husband received from said executors eight hundred and three dollars and eighteen cents on the 21st of January, 1845, and the complainant, Mary Jane, having attained the age of twenty-one years, received from said executors some seven hundred dollars on the 15th of November, 1850; that there is still due the complainants, from said executors, six thousand dollars, or other large sum; that the said Stewart Floyd, one of said executors, departed this life in August, 1853, intestate, without having come to a final settlement with the complainants on account of their interest and share in the estate of the said John Floyd; that said Stewart died utterly and hopelessly insolvent; that his property, chiefly personal, was, at the time of his death, encumbered with mortgages, judgments, and other liens; that said property, or the great bulk of it, is now levied on and advertised for sale under various writs of *feri facias* in favor of sundry plaintiffs, to-wit: Benjamin M. Peeples, Albert G. Foster, and others; that said Stewart Floyd having died without accounting to the complainants for their share of the estate of which he was the representative, they have a right to be paid out of the estate of the said Stewart Floyd before the claims of said execution creditors or any other person whatever; that the complainants have reason to believe that the executors aforesaid have not raised said sum of five thousand dollars, although the property directed to be sold was ample for that purpose, after paying all the testator's debts, and that if the executors did raise the sum, they have not set it apart for the purpose directed, or put it at interest in safe hands, but have used it for their own purposes; that complainants apprehend that their remainder interest in said sum of five thousand dollars will not be forthcoming at the termination of the life estate of the said Mina Floyd, unless the Chancellor will interpose in their behalf, especially as they are uncertain how far the said John J. Floyd, surviving executor, participated in the management, and as they believe and charge that the said Stewart was engaged in the management and control of all the business connected with said estate; that there is not, and will not likely

be, any administration on the estate of the said Stewart Floyd, as he died utterly insolvent; that as they are otherwise remediless, the complainants pray, by their bill—1st, That the parties defendant may fully answer the charges of the bill; 2d, That said execution creditors may be enjoined from selling the property levied on until the complainant's case is heard: 3d, That a receiver be appointed to take charge of the property of the said Stewart Floyd, and hold the same for the benefit of all the parties interested; and 4th, That the complainants have such other relief as their case entitles them to.

JOHN J. FLOYD filed his answer to the bill, in which he makes the following statements, to-wit: He admits the death of testator, the probate of the Will and codicil, and the qualification of Stewart Floyd and himself as executors, as charged in the bill; he also admits the provisions of the Will as quoted in the bill; that Stewart Floyd, one of the executors, took charge of the property and had the same appraised and an inventory and appraisement thereof returned to the proper Court, but denies that he, as executor, ever took the charge or possession of any portion of the property of the said estate, either real or personal; that then, as now, he resided in the county of Newton, and he and all the legatees and creditors of said estate having entire confidence in the said Stewart Floyd, suffered him to manage and control the property of said estate, just as if he were the sole executor of the testator's Will; that he has no reason to doubt the correctness of the exhibits to the bill of complainants; he admits that the fourth item of his father's Will is as the complainants have quoted it; he also admits that the second item of the codicil is correctly quoted, and that it was the testator's desire that said female complainants should have one share of his estate between them, to be held in trust for them by his sons, Stewart and the defendant, until they married or attained the age of twenty-one years, and then to be paid to them, with interest—that is, one equal share, when added to what he had given to their mother, Martha Reese, and to them before that time; that whilst he will not undertake to say, with absolute certainty, what was the intention of the testator, in the premises, he will say that he does not believe that the said testator, by the second item in the codicil to his Will, or any other part of said codicil, ever intended to convey to the said

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Ann Eliza and Mary Jane, any interest whatever in the remainder of the said five thousand dollars, after the marriage or death of the said Mina Floyd, for the reason, among others, that at the time of the execution of said Will and codicil, he had two grand children, the offspring of a deceased daughter, one of whom lived with him as one of his family, and for whom he had as strong natural affection as he had for said female complainants; and yet, whilst he bequeathed to his immediate offspring an interest in remainder, in said five thousand dollars, he did not convey to his said grand children (the children of Ann Swift, deceased,) any such interest in said five thousand dollars—that if he intended by his Will and the codicil thereto, to give the said female complainants an interest in the said five thousand dollars, and not to give the same interest to the Swift children standing in exactly the same relation to him, it would have been a discrimination against the latter for which no reason existed, and which he does not think the testator would have done. Again: the codicil directs that one share, that is, one equal share of the testator's estate, when added to what had been given to their mother, and to them before that time, should be held by the Executors for the said female complainants, and to be paid to them with interest, when they married or attained the age of twenty-one years, and the defendant cannot believe that the testator intended that the Executors should pay to the said Mina Floyd the interest annually accruing on the said five thousand dollars, and also pay to said female complainants interest for the same time, on one-eighth of the same money—moreover, the share of the said female complainants was directed to be paid to them, with interest, so soon as they, or either of them should marry, or attain full age, and if made to apply or extend to an interest in said five thousand dollars, would, to the extent of that interest, defeat the provision made by the testator for his wife, the said Mina Floyd, and the defendant does not believe that such was the wish or intention of said testator; that the said Mina is still living and unmarried; that whatever may be the rights of female complainants, under a proper construction of the said Will and codicil, the defendant submits to the Court; that he admits the marriage of Albert O. Mosely and the said Mary Jane, but cannot say as to the exact time of the marriage—that the said Mary Jane was twenty-one years old before

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the marriage—that the said Mina did not elect to take dower—that he admits that the portions of the female complainants in the estate of testator was payable immediately on their marriage or majority with interest from the time the residuum of said estate commenced to bear interest in the hands of the said Stewart Floyd, which defendant believes was the 25th of December, 1839—that said female complainants never did have any settlement with the defendant on account of their interest in the said testator's estate, nor does he know whether any final settlement as to such interest ever took place between them and the said Stewart Floyd and William Johnston in right of his wife Ann Eliza Johnston, and between the said Stewart and the said Mary Jane, intended by the parties to be final, and was in fact final—that in pursuance of such settlement the said Stewart Floyd on the 21st day of January, 1845, paid to the said William Johnston all that was due him in right of his wife, the said Ann Eliza from the said estate under the said Will and codicil, and that in consummation of such settlement the said William Johnston delivered to the said Stewart Floyd his receipt, of which the following is a copy, to-wit:

“\$803.18.” “Received of Stewart Floyd and John J. Floyd, Executors of John Floyd deceased, eight hundred and three dollars and eighteen cents, it being the amount due by them on the first day of January, instant, of principal and interest coming from the estate of said deceased to Ann Eliza Johnston, formerly Ann Eliza Reese, who is entitled to one-half share as legatee of said estate.”

“January 21st, 1845.” “WM. JOHNSTON, JR.”

The defendant further states that a settlement also occurred between the said Stewart Floyd and the said Mary Jane, after she became of age, in which settlement she was aided by her father, Thaddeus B. Reese—that pursuant to such settlement and in consummation of the same, the said Stewart Floyd paid to her the full amount to which she was entitled under the said Will and codicil of the testator aforesaid, and received from her a receipt of which the following is a copy, to-wit:

“Received of the Executors of John Floyd, deceased, twelve hundred dollars under the Will of the said John Floyd.”

“MARY JANE REESE.”

“15th November, 1850.”

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The defendant pleads these settlements in bar of any other or further recovery in behalf of said complainants against this defendant—defendant admits that the said Stewart Floyd died insolvent in August, 1853, as stated in the bill—that he left considerable property which is encumbered as charged, and that the same was levied on, and since the filing of the bill the same has been sold, and the proceeds of the sale distributed by order of Morgan Superior Court at the March Term, 1854, and the defendant refers to the return of the Sheriff, the fi. fas. and order of distribution, all of which are of file in said Court—that after exhausting all the property of the estate of the said Stewart Floyd, the defendant will be still a large loser by him—that so far as the defendant knows, all the property of said testator was sold by the said Stewart Floyd, which the said Will directed to be sold, and that the said Stewart considered the said five thousand dollars in his hands for the benefit of the said Mina Floyd—that the said John Floyd died in July, 1838, and the property was sold mostly in January, 1839, and since that time and up to some short time before his death the said Stewart Floyd had made payments to the said Mina Floyd of the interest accruing on the said sum of five thousand dollars in whole or in part, and the defendant repeats his positive denial, that the said sum, or any part of it, or any part of the interest thereon, ever came into his hands or was converted by him—the defendant admits that most of the lands belonging to testator's estate were purchased by the said Stewart Floyd for himself and the defendant, and the defendant and said Stewart also purchased some of the negroes, the defendant buying at the sale Isaac, Willey, and Tom, an old man now dead.

In March, 1855, the complainants amended their bill by alleging: That the settlements set up in the defendant's answer were in fact no settlement, and that they proceeded upon a false basis—that if any accounting was had at all it was to Thaddeus Reese, the father of the complainant, Mary Jane Mosely, and to the husband of the said Ann Eliza Johnston, neither of whom were aware of the rights of the said female complainants—that said pretended settlements were made without a due examination into the said accounts and returns of the said Stewart Floyd which returns show a large balance still due to said complainants—that there was a gross mistake

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made in said settlements by a failure to include notes of said Stewart against the said Stewart Floyd, and one Francis Johnston now mentioned in the insolvent notes due to the testator's estate which complainants insist are justly chargeable against said Executors, and which amounted to over six thousand dollars on the 25th of December, 1839—that in the settlement with the said Mary Jane the said Stewart Floyd only paid her seven hundred dollars in money, and gave his note for the balance of five hundred dollars, not as a payment but as a mere memorandum of the balance which he admitted was due to her—that at that time, the said Stewart was largely embarrassed, and on the verge of hopeless insolvency of which the said Mary Jane was not aware at the time of the pretended settlement, and insists that said note, under the circumstance, was not a payment, and did not release the said Stewart from his liability to the said Mary Jane, as Executor and Trustee, or impair her right to charge the estate in his hands for the amount of said note—that she is willing and hereby offers to turn over, and deliver to the Administrator of the said Stewart Floyd the said note, copy of which is as follows, to-wit:

“By the 1st January next, I promise to pay Mary Jane Reese five hundred dollars for value received.”

“1st Nov., 1850.”

“S. FLOYD.”

The complainants further allege that said note was given as a memorandum only, and because the said Stewart Floyd was unable to pay the money—that the said John J. Floyd well knew that said sum of five thousand dollars had not been raised and loaned out by said Stewart as directed by said Will, and that he was consenting to a breach of trust and consented thereto long after the said Stewart Floyd became embarrassed, and was knowing and consenting to the conversion of said five thousand dollars by the said Stewart Floyd to his own use—and that he was also knowing and consenting to his own use and the use of the said Stewart, of the amount of said notes so neglected to be paid, and returned by themselves as received for the estate of the said testator.

This amendment to the bill was answered by John J. Floyd, as follows: That his brother, Stewart Floyd, informed him—and he believed it to be true—that Earnest L. Wittich, Esq., then the Clerk of the Court of Ordinary of said county of Morgan, made out for him a balance sheet of the estate of

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the said testator, counting the interest up to the first day of January, 1845; that he now has the balance sheet so made out by Mr. Wittich, and, after a careful examination of the same, he is unable to discover any mistake in it, and he appends it to his answer by way of exhibit; that the said Stewart Floyd, as defendant is informed, and believes, settled with the said William Johnston, according to the said statement and balance sheet, and paid him the amount specified in his receipt exhibited in his former answer; that the said Mary Jane was entitled at that time to the same, as her sister, the said Ann Eliza Johnson, which she afterwards received with the interest on the same, from the settlement with Johnston, to the settlement with her; that he believed the father of the said Mary Jane was present at the settlement with her, because the body of the receipt which she gave, is in his hand-writing, whilst the signature is in her own; that he does not know how thoroughly the said Thaddeus B. Reese examined the account and returns of the said Stewart Floyd, at the time of the settlement, but he verily believes that the said Reese understood the basis of the settlement, for this defendant does know that he usually looked closely to any interest he, or his children had in the estate of their maternal grand-father, and has no doubt but what said Reese thought, and was well satisfied that the settlement exhibited the true amount due to the said Mary Jane; this defendant not knowing the facts, has heard, that seven hundred dollars only was paid to the said Mary Jane, and that a note was given by the said Stewart Floyd for five hundred, but this defendant does not believe that said note was given as a mere memorandum, but was accepted and receipted for by the said Mary Jane as cash, or in lieu of cash, and that it was deemed an evidence of indebtedness from the said Stewart Floyd to the said Mary Jane; the defendant cannot say how far the said Mary Jane was familiar with the pecuniary condition of the said Stewart Floyd at the time of said settlement, but verily believes that her father was thus familiar, because he lived in the same town with him at the time, and had so lived for many years; and whilst the defendant admits that when said note for five hundred dollars was given, the said Stewart was in debt he does not believe that he was insolvent, but believes he was then able to pay all his just debts; the defendant denies that he knew

of, or consented to, any neglect or failure to raise said sum of five thousand dollars, as directed by said will, but believes that the said Stewart Floyd did raise it as directed; the defendant also denies, that he knew of, or consented to, any breach of trust, on the part of the said Stewart, in relation to said five thousand dollars, or that he knew of any neglect or failure to pay, or collect, any notes due to the estate of said testator on the part of the said Stewart Floyd, as this defendant had nothing to do with the management of said estate, the defendant has long since paid off, and fully discharged all his indebtedness by note or otherwise to said estate, not dreaming but that it was safe and proper for him to do so; that he had no doubt, but what the said Stewart, was fully able to pay all his debts and liabilities until a short time before his death; that on the sick bed from which he never arose, the said Stewart informed him, that he had used the said sum of five thousand dollars, and was not able to replace it; that this announcement not only astonished the defendant, but came too late for him to remedy the difficulty, but the defendant believes that, in the settlements aforesaid with the said Mary Jane, and the said William Johnston, the said Stewart Floyd included, and accounted for, all his liabilities to them, and to the said estate of said testator, and again pleads said settlements in bar of a recovery by complainant. The defendant repeats, that although he qualified as executor of the testators' Will, he did not take possession or control of any portion of the estate; that he was not cognizant of, or consenting to any waste of the assets of said estate by the said Stewart Floyd; on the contrary the defendant, and all the legatees had entire confidence in the fact, that the said Stewart would wind up said estate according to law, and the Will of the testator; that the said Stewart owned and held a large property in land and negroes, in the vicinity of most of the legatees, and especially of the complainants, which was of an aggregate value, equal to, if not greater than the estate of which he had the management; that from the time of the testator's death, up to the marriage of said female complainant, the defendant lived in Newton county, and knew little or nothing of the management of the testator's estate, and believed that the complainants had been fully settled with; that sometime after the testator's death, defendant was informed that it was the wish of the said Mina

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Floyd, that the sole management of the five thousand dollars set apart for her support and maintenance, should be confided to the said Stewart, as he lived near her, and would be more convenient to transact her business with him, than with him and defendant jointly, and in furtherance of this wish of the said Mina, the said Stewart on the 1st day of January, 1840, gave to this defendant a receipt, of which the following is a copy:

"Received of the executors of John Floyd, deceased, the sum of five thousand dollars, as the portion of said estate from the interest of which Mrs. Mina Floyd, widow of the said deceased, was to be supported.

January 1st, 1840.

"S. FLOYD."

and after that time the said Mina Floyd dealt with the said Stewart as her sole trustee; the defendant further states, that on the 1st day of January, 1842, the said Stewart Floyd made a calculation of said estate, so as to ascertain the amount due to each legatee under the Will of said testator, from which it appeared that each share of said estate amounted to twelve hundred and ninety dollars, and on that day the said Stewart as trustee for the female complainants, gave to defendant a receipt, of which the following is a copy, to-wit:

"Received of the executors of John Floyd, deceased, the sum of twelve hundred and ninety dollars, as the portion of the children of Martha Reese, deceased, in the estate of said deceased, which has been sold."

January 1st, 1842.

S. FLOYD,

Trustee.

The defendant accounts for the fact, that the receipts of William Johnston, and Mary Jane Reese, express the sums therein named, to have been received from the executors, instead of from Stewart Floyd as trustee, only that the body of said receipts were not written by the said Stewart, and that it was an oversight in him not to have observed their form, and this defendant is well satisfied that the said Mary Jane and her father intended to rely solely on the said promisory note of the said Stewart, taken in said settlement, as neither of the complainants, or the said William Johnston or the said Thaddeus B. Reese ever said anything to the defendant indicating an intention to look to him for anything concerning the interest of complainants in the estate of John

Floyd, deceased, or that would indicate an opinion that the defendant had anything to do with it, or was in any manner liable for it, until their said bill of complaint was filed.

The exhibits to the complainant's bill were:

1. An inventory and appraisement of the estate of John Floyd, deceased.

2. A return of the sale of the perishable estate of John Floyd, deceased, sold on a credit until 25th December, 1839, by Stewart Floyd, one of the executors, amounting to \$4,689,78.

3. A return of the sale of the negroes, and part of the land belonging to the estate of John Floyd, deceased, sold on the first Tuesday in January, 1839 on a credit until the 25th of December, 1839, sale bill returned by Stewart Floyd, and amounting to \$15,326,66.

4. Return made by Stewart Floyd, showing disbursements made for the estate of John Floyd, deceased, amounting to \$4,789,52 1-2.

5. Return showing receipts for the estate of John Floyd, deceased, amounting in the aggregate to \$770,89, and disbursements for said estate amounting to \$3,564,37 1-2.

6. The Will of John Floyd, deceased.

The exhibits to defendant's answer were—

The four receipts copied in the answers, and a calculation of said estate made by Ernest L. Wittich, showing the whole amount due from the executor on the 1st day of January, 1845, to be \$14,457,26, which sum divided between nine legatees make due each, \$1,606,36.

On trial of the case in the Court below, the only evidence adduced were the Bill, answer, and exhibits to the bill and answer.

The presiding Judge charged the Jury as follows:

“That John J. Floyd, not having participated in the management of the estate, no decree could be made by the Jury against him; that although said John J. Floyd had qualified as executor, yet he was not liable if the estate had been managed entirely by his brother, and wasted by his brother, Stewart, his co-executor, although it did appear that funds enough to cover the entire claim of the complainants, arising from the indebtedness of the said John J. Floyd, to the estate had been paid over by him to his executor, such indebtedness being for purchases made by him at the executor's

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sale made by his brother; it being his duty to pay as other purchasers." The presiding Judge further charged the Jury; "that with regard to a note which the evidence showed had been made to Mary Jane Reese, now Mrs. Mary Jane Mosely, by Stewart Floyd in his life time, and which was admitted to have been given to her by Stewart Floyd on a settlement of the amount coming to her as legatee under the Will of the said John Floyd, deceased, the Jury might look to the matter of diligence, which had been used by Mary Jane Reese, now Mrs. Mosely, in enforcing its collection, upon the question, whether the taking of said note discharged the claim of the said Mary Jane to go back upon the said Stewart as executor; that whilst it was true, that a note given under such circumstances was not a payment unless it was agreed to be received as such; yet if it appeared that two years and a half had intervened between the execution of said note, and the death of the said Stewart Floyd, during which time the said payee had not sought to enforce the collection of the note, was a circumstance from which the Jury might find that, because she had not used proper diligence in seeking to enforce the collection of the note in that time, she had lost her right to look to her original claim against the estate, and the said note "*pro tauto*" should be held as payment.

All and every part of this charge was excepted to by complainant's counsel and are assigned as error.

The Jury returned the following verdict:

We, the Jury find and decree in favor of John J. Floyd individually. We further find and decree that the complainants, Albert G. Mosely and wife, and Ann Eliza Johnston, have each of them received their interest in the residuum under the last Will and testament of John Floyd, deceased. We further find and decree that Stewart Floyd, as the executor of John Floyd, deceased, had reduced to his possession the sum of five thousand dollars from the interest of which Mina Floyd, the widow of the testator, was to be supported, and that before his death, the said Stewart Floyd had wasted or appropriated the same to his own use. We further find and decree that the complainants, Mary Jane Mosely and Ann Eliza Johnston are each entitled to one-half of one-eighth of said five thousand dollars, to-wit: the sum of seven hundred and seventy-seven dollars and seventy-

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eight cents, which said sums we find and decree, shall be paid over by the Sheriff, out of the money in his hands raised from the sale of the individual property of Stewart Floyd, deceased, to John J. Floyd, surviving executor of John Floyd, deceased, to be paid by him to Albert O. Mosely and wife, and Ann Eliza Johnston, respectively, as here-in-before decreed, at the death of the said Mina Floyd; and we further find and decree that the costs of this proceeding be paid out of their funds in the hands of the Sheriff, raised as aforesaid."

The charge of the Judge, and the decree rendered, constitute the errors complained of in this case.

JUNIUS WINGFIELD for plaintiffs in error.

AUGUSTUS REESE for defendeant in error.

By the Court.—LYON, J., delivering the opinion.

This was a bill filed by the complainants, plaintiffs in error, against John J. Floyd and others, for account.

John Floyd, late of the county of Putnam, by his last will, appointed his two sons, Stewart and John J. Floyd, the principal defendants in this case, executors thereof, and by the 4th item directed all the balance of his property, not otherwise specifically disposed of, to be sold; and from the proceeds he gave to his two sons, the said Stewart and John Floyd, the sum of five thousand dollars, in trust, to pay the interest thereon to his widow, Mina Floyd, during her life, and at her death, to be divided equally among his children, or the representatives of deceased's children, in the manner specifically stated therein. The balance of the proceeds of the sale was to be divided equally among his children, or representatives of children, of whom there were eight, in all, or rather eight shares or parts into which this residuum was to be divided: Martha Reese, the wife of Thaddeus Reese, and mother of complainants, Ann Eliza and Mary Jane, being one; Mrs. Reese dying before her father, he subsequently, by a codicil to his Will, bequeathed to these, her children, the share directed to be given to her by the original Will.

Both of the executors were qualified, but Stewart alone executed the Will; the defendant, John J., taking no part what-

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ever in the active administration thereof. The property of the testator was sold by Stewart, as executor, John J. attending the sale and buying much of the property, gave his notes for the same to his brother, and took them up as other purchasers.

The five thousand dollars, in which the widow had the life interest, went into the hands of Stewart, as one of the trustees named in his father's Will, for that purpose, he executing a receipt to the executors for the same, as trustee, John J. Floyd not appearing to have accepted that trust.

Stewart Floyd, during his life, settled with and paid to the complainant, Johnson and wife, for all interest or claim they had on him in that right under the Will, other than their part of that fund in which the widow had a life-estate. He also, on the 15th day of November, 1850, had a settlement with Mary Jane, the other complainant, then of age and unmarried; when the amount due to her under the Will, exclusive of her interest in the five thousand dollars set apart for the widow for life, was ascertained to be twelve hundred dollars; and in settlement of this amount, the said Stewart gave to her seven hundred dollars in money, and his note for five hundred dollars, due on the first day of January next thereafter, and she executed to him a receipt, of which the following is a copy:

"Received of the executors of John Floyd, deceased, twelve hundred dollars, under the Will of said John Floyd, 15th November, 1850. MARY JANE REESE."

Stewart Floyd, subsequently to these settlements in October, 1853, departed this life insolvent, having appropriated to his own use, or wasted, the five thousand dollars in which his mother had the life-interest, and without having paid the note given to the complainant, Mary Jane, or any part of it; all of his property having been seized and sold by the Sheriff under Common Law executions against him, in favor of various creditors.

The bill was filed by all the complainants, to charge the defendant, John J. Floyd, as co-executor, with the payment of the five thousand dollars, or rather with their share, which was the one-eighth part of the sum, after the termination of the life-interest. Failing in this, to have that interest secured and set apart from the proceeds of the sales of the property of said deceased, Stewart Floyd, under the provisions of

"An Act for the better protection and security of Orphans and their Estates," approved February 18th, 1789, (*Cobb's Dig.*, 288,) and by the complainants, Mosely and wife, to charge defendant (Floyd) as executor, with the payment of the note given to the said Mary Jane, before her marriage, by Stewart Floyd, in his life-time, for five hundred dollars, alleging that it was not received by her as a payment, but as a memorandum of the balance due her on that account; (this allegation was denied by defendant, who asserted that it was taken as a payment;) but failing in charging defendant (Floyd) with its payment, the bill sought to charge the fund in the Sheriff's hands with its payment, as a debt due by the deceased, in his character as executor, and therefore a preferred debt in the same way, as the debt of two thousand dollars, was a preferred one.

The cause was submitted to the Jury on the bill and answer, and no other evidence offered.

On these facts, two questions were made and argued before us:

1st. Whether the defendant, John J. Floyd, was liable, individually, for the waste committed by his co-executor, the deceased, Stewart Floyd?

2d. Whether the note for five hundred dollars, given by Stewart Floyd to complainant, was received as a payment or as a mere memorandum, as evidence of the amount of the debt? If the former, then neither is the defendant, nor the funds in the hands of the Sheriff, chargeable with its payment as a preferred debt.

1. It is not pretended that the defendant is liable for any of the acts or waste of his deceased co-executor, but those to which he actively contributed; that rule is conceded. But it is claimed, that the defendant, qualified as executor, and subsequently purchased property of the testator and paid the money for such purchases to his co-executor, that he, in doing so, actively contributed to the waste; that he ought to have retained what he was indebted for purchases, in his own hands, and paid it out only in execution of the trusts of the Will, and by not doing so, but in paying it over to his co-executor, he became liable *pro tanta* in this account.

If we assented to the proposition—which we do not—we could only charge the defendant with the amount paid over by him that was actually diverted from the trust and wasted

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by the co-executor. And there is nothing in the record to show that any part of the money paid by defendant into the hands of his co-executors was actually wasted or misapplied. It is not improbable that the money or payments made by defendant to his co-executor were properly applied by him to the payment of debts, legacies or otherwise, in execution of the Will. Before the defendant is made chargeable, there ought at least to be a *prima facie* case made against him. That has not been done. But we cannot admit the proposition to be true, that when the heirs, legatees or distributees of an estate permit one executor to bid for, and purchase property at a sale by his co-executors, and give his notes therefor as other purchasers, and he subsequently pays over the money due on his notes so given, in discharge of his liability, and that money is wasted, that such executor, so buying and paying for his purchases, is liable for such waste. If it be conceded, as it was in this instance, that the executor was a competent purchaser—for those interested in the estate had acquiesced in, and ratified his right to do so—then such executor, so buying at the sale of his co-executor, and, like all other persons, complying with its terms, must, like other purchasers, pay his notes in order to cancel, discharge and get possession of them. The money he pays over is his own, and not the estate's, and did not become the property of the estate until it was paid over. His co-executor could have traded the notes; could have enforced their collection in a Court of Law, as his own, treating the sale as an execution of the trust, and not the collection of the money from the purchasers; in fact, the Law so regards a sale, as an administration. Then, how could the fact of the defendant's paying his own money over, in the necessary satisfaction of a debt legally and properly incurred, be regarded as an act contributing to the waste and misapplication of trust funds by his co-executor? We do not think it can be so. Now, if funds belonging to the trust had come to the hands of defendant from any source, and he had paid it over to his co-executor for any reason, and that money should be wasted, the defendant would be liable for the same to any one interested in the estate.

There is still another reason why the defendant is not liable for the five thousand dollars set apart by the 4th item of testator's Will for the use of his widow during life. That money

was raised and received by the deceased executor, not as executor, but as trustee under the Will; that certainly relieved the defendant from liability for it, as executor, and he cannot be charged with it, as trustee, for he never accepted, or acted upon, that trust.

2. For the reason already given, we do not hold the defendant to be chargeable with the note for five hundred dollars, given by Stewart Floyd to the complainant, Mary Jane. But there is another that does not apply to the other question, and that is this: Conceding that, at the time the note was given, the defendant was liable to the payee, the giving that note by Stewart Floyd, and the taking of it as a security for the money by the payee, effectually discharged the defendant from any further liability for that debt. "While the mere giving a note does not discharge the original indebtedness, unless it be accepted as payment at the time, it is, nevertheless, equally true, that if the creditor changes the nature or character of the debt, as by taking the note of one of the parties, and giving day of payment, the other is exonerated. He has a right to suppose that he is no longer looked to as a debtor." *Stone vs. Chamberlain & Bancroft*, 20 Ga., 262.

3. Then, as to the other only remaining question in the case, was the note given and accepted as payment, or merely as a memorandum of the indebtedness? If the former, then the complainant's equitable claim on the fund from the sale of the deceased's property is gone.

Whether, as a payment, depends entirely upon the intention of the parties to the transaction at the time of its execution. The only data we have to ascertain that intention, are the note, the receipt given at the time, and the acquiescence of the complainant. From the note, we infer nothing one way or the other. But the receipt, we think, is a pretty clear indication that the note was given and received as a payment. The ascertained indebtedness was twelve hundred dollars, a part of which was paid in money, and a part in this note; but one receipt was given, and that for the entire sum of twelve hundred dollars, the money and the note being equally treated as money; no distinction was made. The money was surely treated as a payment, and if so, why was not the note? The receipt intended as evidence of the payment, speaks for the note as well as the money.

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Besides, the maker of this note lived some two years and a-half after its execution, and was, at its date, reputed to be in good and solvent circumstances. If it had been taken as a mere memorandum or evidence of the amount of the indebtedness, it is very probable that the same reasons that impelled the accounting would have induced an enforcement of the demand by suit. As no such attempt was made, for so long a time, and while the maker was in life, it is but fair to suppose that it was intended as a payment, and the note held as a satisfactory investment of the money. We do not hold this to be conclusive, by any means, but sufficient as a foundation for the charge complained of; that is, that the Jury might look to this fact as a circumstance indicating that the note was intended as a payment.

The Judgment of the Court below is in accordance with our view of the rights of the parties.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT
ATHENS, NOVEMBER TERM, 1860.

Present—JOSEPH H. LUMPKIN, }
 RICHARD F. LYON, } JUDGES.
 CHARLES J. JENKINS, }

LITTLETON *vs.* WYNN.

The relation of landlord and tenant must exist, to maintain the action of use and occupation. That is, there must be a contract either express or implied, and it cannot be implied when the possession is adverse to the title.

Action for use and occupation, in Warren Superior Court.
Decision by Judge THOMAS at the April Term, 1860.

The record in this case presents but one question, which arises out of the following state of facts, to-wit:

William Littleton, as the Administrator of Lucy Bray, deceased, instituted an action against Cynthia Wynn, to recover the sum of twelve hundred and fifty dollars, for the alleged use and occupation of a certain tract of land, with the tenements and improvements thereon, containing one hundred and ninety-one and a half acres, adjoining lands of

Littleton vs. Wynn.

Sarah Hall, Henry Wynn, the said Cynthia, and others, from the 1st day of January, 1854, to the 1st day of November, 1858.

To this action the defendant pleaded, amongst other things: That the plaintiff before that time did commence and prosecute an action of ejectment for the land aforesaid, against Thomas Wynn, the husband of defendant, then in life; and also for the recovery of mesne profits from the — day of —, 1853; that pending the action, Thomas Wynn died, and William Gibson and Henry Wynn, his Administrators, were made parties defendant; that at the April Term, 1858, of said Court, the plaintiff obtained a verdict against said Administrators of Wynn, for the premises in dispute, as well as for the rent of the land, from the year 1853 until the time of the rendition of said verdict; that the plaintiff is estopped by said verdict and the judgment thereon, although the plaintiff wrote off from said verdict and judgment the mesne profits accruing after the death of the said Wynn; inasmuch as this defendant went into the possession of the land, under said Administrators of Wynn, and occupied the same as their tenants at will, from the death of her husband until the rendition of said judgment.

The plaintiff demurred to this plea as insufficient, and moved to strike the same from the pleadings in the case.

After argument had thereon, the presiding Judge overruled the demurrer and motion of the plaintiff, and that decision, constitutes the error alleged in the record.

WAFDEN & NELMS, for the plaintiff in error.

E. H. POTTLE, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

The demurrer to the plea was properly overruled in this case, not on the ground relied on, that there had been a former recovery by the plaintiffs against others for the same cause of action, which is the foundation of this suit; but because the plea shows that the possession of the premises, by the defendant, for which this action of use and occupation is brought, was adverse to the title of the plaintiff; and for that the action does not lie. "The relation of landlord and

tenant is necessary to sustain such an action."—*Barnes & Shinholster*: 14 Geo. 133. In other words, the action depends entirely upon a contract, either express or implied—express where the parties have stipulated for the payment of rent, or implied when a contract is presumed from the title of the one and the possession of the other; this presumption of a contract is rebutted when it appears that the tenant does not hold under, but adversely to him who holds the title. During the time the defendant had the possession of the premises, for which this action is brought, an action of ejectment was pending at the instance of the plaintiff against the persons under whom defendant held, there could not then have been a contract, either expressed or implied, between these parties for the use and occupation. The relation of landlord and tenant did not exist and the suit cannot be maintained. In *Birch vs. Wright*, 1 Q. R., 378, the same being an action for use and occupation, Ashurst, J., says: From the 6th of April, 1785, to the time of recovering in the action of ejectment, in my opinion the plaintiff is precluded from recovery in this form of action, for that would be blowing both hot and cold at the same time by treating the possession of the defendant as that of a trespasser and that of a lawful tenant at the same time. The plaintiff can not first recover in ejectment and then for use and occupation for the time subsequent to the day of the demise in such ejectment.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the judgment of the Court below be affirmed.

Galloway *et al.* vs. Camp.

GALLOWAY *et al.* vs CAMP.

When one is arrested under Ca. Sa. and gives bond for prison bounds, and subsequently escapes therefrom, the fact that the plan of the prison bounds has not been returned and recorded on the Minutes of the Superior and Inferior Court as required by the statute, does not affect the validity of the bond.

Debt in Walton Superior Court. Tried before Judge HUTCHINS, at the February Term, 1860.

There is but one question made by the record in this case, and it arose out of the following state of facts, to-wit:

In the year 1842, prison bounds were laid off around the common jail of Walton county, including an area of one hundred acres. Plats of the survey, with a full and minute description of the lines, and metes and bounds, were made out by the surveyor. One of the plats was filed in the office of the Clerk of the Superior Court. The first was not recorded on the Minutes of the Inferior Court until the 18th of May, 1858. Thomas Galloway, being arrested by the Sheriff of Walton county, by virtue of a *capias ad satisfaciendum*, in favor of Charles Camp, executed his bond, with William H. Goodson, as his security, to remain within the limits of said prison bounds. The conditions of the bond being broken by said Galloway's transgressing the said bounds, this action was brought by Camp, against Galloway and Goodson, to recover damages for a breach of the bond.

On the trial of the case, the plaintiff introduced the *ca. sa.* with the arrest thereon, and also the bond, which was dated the 22d of December, 1857, and proved that Galloway left the prison bounds in violation of his said bond.

The plaintiff then offered in evidence the two plats aforesaid, which were objected to by defendant's counsel, on the ground "that in laying off and recording the prison bounds the statutes had not been complied with, and that the bond was therefore void," which objection the Court overruled.

The case being submitted to the jury, they returned a verdict for the defendant.

The counsel for plaintiff then made a motion for a new trial, which was granted by the presiding Judge at the August

Term, 1860, on the ground that the verdict was contrary to evidence.

This decision is alleged as error, and the question is, whether a bond to keep within prison bounds is good, where the survey is made, and a plat returned and filed in the proper offices, but not recorded, until after the bond is given.

HULL & HILLYER, for plaintiff in error.

WALKER & McDANIEL, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

Thomas Galloway, one of the plaintiffs in error, having been arrested, under a *ca. sa.*, at the instance of the defendant in error, Charles Camp, by the Sheriff of Walton county, gave to the Sheriff his bond, with William H. Goodson as his security, for the purpose of obtaining the privilege of prison bounds as provided for by the act of 22d December, 1820, *Cobb* 384. Galloway subsequently, while under prison bounds, left the boundaries thereof, and this action of debt was brought by the defendant in error, for this breach of the bond. A plan of the survey of the prison bounds as recorded in the offices of the Clerk of the Superior and Inferior Courts of Walton county, together with the writ of *ca. sa.* under which the arrest was made, the arrest, the bond for prison bounds and the proof of the escape, having all been put in evidence, the defendant in error rested his case.

The plaintiffs in error, defendants in the Court below, put their defence on the ground that at the time of the giving this bond the prison bounds had not been established or laid off in compliance with the statute; that the prison bounds were not legal and the bond was therefore void. The prison bounds in Walton were laid off and established under the Act of 22d December, 1840; *Cobb's Dig.* 389.

The 1st section of that Act makes it the duty of the Sheriff, under the direction of the Inferior Court, at any time they may deem it expedient, to cause to be laid off prison bounds, in every county in the State, having jails, where no bounds had been previously laid off, in conformity with the Acts of 22d Dec., 1820, and 24th Dec., 1821.

The 2d section authorizes the Inferior Courts to re-survey or change prison bounds when previously laid off.

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The 3d section enacts, "in all cases when prison bounds shall be hereafter re-surveyed or laid off, it shall be the duty of the Sheriff to return a plan of the same to the Superior and Inferior Court of the county, which shall be entered on the Minutes of each of said Courts, and a duly certified copy thereof from the Minutes of either of said Courts shall be evidence in any of the Courts of this State."

4th Section gives discretion to the Inferior Court to extend the bounds laid off in an incorporate city, town or village, so as "to include not more than one hundred acres."

The bond was executed on 22d Dec., 1857; the plan of prison bounds was not recorded on the Minutes of either the Superior or Inferior Court at that time nor until some time after, though the survey was made in 1842. Neither did the record show that the plan had been returned by the Sheriff, or that the survey had been made under the direction of the Inferior Court. For these reasons the plaintiffs in error contend that the bond is void. We do not think so. Whether the prison bounds had been laid off in compliance with the Acts or not was wholly immaterial; by giving the bond, the plaintiff in error waived any or all irregularities that might have existed in their being laid off or established. The presumption is, that they were laid off and established in terms of the Act, and there is nothing in the record contradicting that presumption. At the time of the arrest, it is true that the plan had not been recorded, though returned to the Clerk, but that omission of the Clerk did not affect the supremacy of the survey, or the legality of the bounds. But allow that the bounds were illegal, that could not affect the bond. The plaintiff in error had given his bond that he would not go beyond those bounds; he violated that obligation, and it does not now lie in his mouth to say that the provision of which he took the benefit was illegal.

JUDGMENT.

Whereupon it is considered and adjudged by the Court that the judgment of the Court below be affirmed.

STEPHENS vs. HOPPER.

S. and H. agreed to submit matters in litigation between them, to the arbitration of certain persons named, who "as arbitrators should settle, adjudicate and pass upon the aforesaid several matters in controversy, under the provisions and regulations of an Act, entitled an Act, to authorize persons to submit controversies to arbitration," approved March 5th, 1856. *Held*, that the award to be good must be unanimous, notwithstanding the arbitration was not had until after the passage of the amendatory Act of 12th of December, 1859, making the agreement of two of the arbitrators to the award, under that Act, sufficient.

Motion to make an award the and judgment of the Court, in Oglethorpe Superior Court. Decided by Judge THOMAS, at the October Term, 1860.

The question made by the record in this case, arose out of the following state of facts, to-wit :

On the 30th of March, 1858, John U. Stephens instituted his action on the case, against Jonathan Hopper, to recover damages for slanderous and defamatory words, alleged to have been published by said Hopper, of and concerning said Stephens.

On the 28th day of March, 1859, the said parties, by an agreement in writing, of that date, under their hands and seals, agreed to submit the matter in controversy in said action to arbitration.

The submission recited the pendency of the action, and gave, with particularity, the words charged to have been spoken by defendant of the plaintiff, and then concluded as follows, that is to say: "Upon all of said charges, the said Jonathan Hopper joins issue, denying them in whole, and in part. And the said Jonathan Hopper, and the said John U. Stephens, for the purpose of settling said matter in a more summary or speedy way than the ordinary proceedings at Law, do hereby agree to submit, and do hereby submit, the aforesaid suit to arbitration, under the Act of the Legislature of the State of Georgia, approved March the 5th, 1856, entitled 'An Act to authorize persons to submit controversies to arbitration.' (See *private Acts*, 1855-6, page 222.) And for the purposes of said arbitration, the said John U. Stephens doth select John S. Hubbard, of said county, and

Stephens vs. Hopper.

"I dissent from the above award, and am willing that said Hopper pay to John U. Stephens the sum of seven hundred and fifty dollars, and costs of suit.

"G. W. MATTOX."

Counsel for the plaintiff moved to enter the award on the Minutes, and make it the judgment of the Court, as an award for one thousand dollars, and costs of suit.

Upon objection being made to said motion, the presiding Judge overruled the motion, "on the ground that the award was not unanimous."

This decision is the error complained of in this case.

JOHN T. LOFTON; J. D. MATTHEWS, and HESTER & AKERMAN, for plaintiff in error.

E. C. SHACKELFORD, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

We agree with the Court below, that the award of the arbitrators should not have been made the judgment of the Court. The parties had agreed to submit the matter in litigation between them "to arbitrators, under an Act of the Legislature, approved March 5th, 1856, entitled "An Act to authorize persons to submit controversies to arbitration," and that the persons selected and named in the agreement of submission, should, "as arbitrators, settle, adjudicate, and pass upon the aforesaid several matters in controversy under the provisions and regulations of the aforesaid Act." Under this submission, the arbitrators were to be governed in their deliberations, and to return their awards according to the stipulations and provisions of that Act. All of its provisions and requisitions were made a part of the agreement of submission, as much as if each one had been distinctly written out and signed by the parties, and a material departure therefrom, by the arbitrators, would render the award void. One of the essential requisites to the validity of the award, under that Act, according to the construction of this Court, in *Smith vs. Walden*, 26 Ga., 249, is, that the award must be agreed to by the whole of the three arbitrators. Unanimity was, therefore, as essential to the sufficiency of the

award as if it had been so stated in the agreement—that was the agreement—and as the award was not agreed to by all the arbitrators, it was properly rejected.

But it is claimed that the parties, by referring again to the Act of 1856, in the modified agreement of 12th October, 1860, after that Act had been amended by the Act of 12th December, 1859, making the concurrence of two of the arbitrators sufficient to make the award good, intended that the Act of 1856, as amended, should govern and control the deliberations and award of the arbitrators, and that the award was good under that Act as amended. We do not think so. The reference marks more distinctly the intention of the parties, that the award should be made in accordance with all the requirements of the Act of 1856, save only in such matters as they expressly waive by the latter agreement. That the Act of 1856 was amended, does not affect the agreement: it remains as it was made, and a change of the Law does not alter it.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

DOE *et al.* vs. ROE.

1. It is not necessary to the validity of a grant of land from the State of Georgia, that there should be a recital in the grant, that the Surveyor of the county, wherein the land is situated, had advertised his survey of the premises granted, according to law.
2. In an action to try the title to real estate, between parties both of whom claim title by grant from the State of Georgia, a grant will not be held involved, because it conveys to one person, more than one thousand acres of land.
3. A deed, for land, more than thirty years old, found in the proper custody, accompanying other deeds, together constituting a chain of title, and free from all suspicious appearances, is admissible in evidence without proof of execution.
4. An exemplified copy (conforming to the provisions of the Act of Congress) of a testamentary paper, executed, published, probated and recorded as a last Will and Testament, in the State of Maryland, may be a good muniment of title to real estate in Georgia, even though the Will was neither probated, nor recorded in this State.

Ejectment in Hart Superior Court. Tried before Judge THOMAS, at the September Term, 1860.

This was an action of Ejectment instituted in the Superior Court of Hart county, in favor of John Doe, on the demise of Barnabas J. Dooly, Executor of William Dooly, deceased, against Richard Roe, casual ejector, and William McCurley, tenant in possession, to recover a "tract of land lying in said county of Hart, on the north side of Lightwood Log Creek, containing seven hundred acres, more or less, being the tract of land granted in the year 1836, to Daniel Boatright."

Pending the action, William T. Vanduzer, Administrator of Ira Christian, deceased, was regularly made co-defendant.

The action was commenced on the 26th of August, 1856.

On the trial of the case in the Court below, the following testimony was adduced, to-wit :

Evidence for the Plaintiff.

A grant, for the premises in dispute, to Daniel Boatright, dated 17th December, 1836.

A deed from Boatright to William Dooly for the premises in dispute, dated 14th of November, 1840.

The Will of William Dooly, deceased, and Letters Testamentary issued to said Barnabas J. Dooly, as Executor thereof.

The plaintiff also introduced several witnesses, whose testimony made out his case and then he rested.

Evidence for the Defendant.

A copy grant (used as the original by consent) to Isaac Briggs, for five thousand three hundred acres of land, dated the 17th of January, 1787.

Counsel for plaintiff objected to this grant as evidence, because it issued for more land than the law allowed—because it did not show the name of chain carriers, and because it did not appear that the survey was advertised.

The Court overruled the objection, and admitted the grant.

The defendant also introduced the surveyor, F. B. Hodges, a plot made by him pursuant to the survey, and some other testimony applying the grant to the premises in dispute, and then the defendant rested.

The plaintiff then introduced six witnesses, whose testimony is not given in the record, and which the defendant met by the testimony of ten witnesses and several leases, and rent notes, none of which is given in the record.

The defendant introduced a deed from Isaac Briggs to Thomas Smythe, for the premises in dispute, dated 6th of March, 1793.

The defendant offered a deed from Joseph W. Patterson, Edward Patterson, and George W. Patterson to the heirs general of Ira Christian, deceased, which deed purported to have been made in the city of Baltimore, in the State of Maryland. It was signed by David Stewart and John Stewart as witnesses. David Stewart certified on the back of the deed that he was a Commissioner of Deeds for the State of Georgia, appointed according to law, and that Joseph W. Edward and George W. Patterson came before him, and acknowledged the execution of the deed for the purposes there mentioned, as their voluntary act and deed. The deed was recorded 9th of September, 1857.

This deed was objected to by counsel for plaintiff, but the objection was overruled. The ground of the objection is not stated in the record.

Doe et al. vs. Roe.

The defendant also offered a deed from Henry Patterson to George Patterson, conveying all the interest in the land in dispute, to which said Henry was entitled under the Will of his father, William Patterson, dated the 15th of June, 1837. The deed was attested by but one witness, to-wit: David Stewart. The hand-writing of David Stewart was proved by the depositions of Charles F. Mayer, to which the deed was attached. The deed was objected to, on the ground that there was but one witness to it, and because the hand-writing of the maker of the deed was not proved. The objection was overruled and the deed admitted.

The defendant offered in evidence, an exemplified copy of the Will of William Patterson, deceased, with the probate thereof taken from the records of the proper Court in the county of Baltimore, and State of Maryland, and duly certified as an exemplification from another State. Counsel for the plaintiff objected to the exemplification, on the ground that the Will had never been recorded in Georgia.

The objection was overruled, and the exemplification admitted.

The defendants then offered in evidence a deed from Thomas Smythe to William Patterson, for the land in dispute, dated the 9th of May, 1793, and attested by George Salmon and George Gould Presbury as witnesses. The deed was attached to interrogatories and exhibited to Randall H. Moale and Nathan Williams, who testified that Salmon and Presbury, the witnesses to the deed, were both dead; and that they had seen Presbury write, and knew the signature of Salmon from his being a Justice of the Peace, a merchant, and President of a Bank in the city of Baltimore; that they are acquainted with the hand-writing of said Salmon and Presbury, and believe their signatures to the deed to be their genuine hand-writing.

The deed was objected to because the witnesses did not swear that they had ever seen Salmon write, nor did they give any other lawful means of knowing his hand-writing, and because the signatures of the maker of the deed was not proven.

The Court overruled the objection and admitted the deed.

The defendant also introduced a bond for titles to the land in dispute from Thomas, agent of the Pattersons, to Christian, dated 26th of November, 1851; also a Power of Attorney from the Pattersons to said Thomas, and introduced two

other witnesses, whose testimony is not stated in the record, and then closed.

The Court charged the Jury, amongst other things, "that the grant from the State of Georgia to Isaac Briggs, although it was for 5,300 acres of land, and although it did not give the names of the chain carriers or show that the survey was ever advertised, was a good grant, and conveyed to Isaac Briggs a good title to the land embraced in it, provided the same had not been previously granted by the State."

The Jury returned a verdict in favor of the defendant.

Counsel for the plaintiff then moved for a new trial of said case on the following grounds, to-wit:

1. Because the Court erred in admitting the grant from the State of Georgia to Isaac Briggs, over the objection urged thereto by counsel for plaintiff.

2. Because the Court erred in admitting the deed from Patterson to the heirs of Christian.

3. Because the Court erred in admitting the deed from Henry Patterson to George Patterson.

4. Because the Court erred in admitting the exemplified copy of William Patterson's Will, over the objection of plaintiff's counsel.

5. Because the Court erred in admitting the deed from Smythe to Patterson, and the evidence of Moal and Williams relative to the same.

6. Because the Court erred in charging the jury, as herein before stated.

The presiding Judge overruled the motion and refused the new trial, and that decision is the error alleged in the record in this case.

ROBERT MILLICAN and WASHDEN & NELENS, for the plaintiff in error.

HUNTER & AKEMAN, for the defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

The 1st and 6th exceptions appearing in the record before the Court depend upon the same question, viz: the validity of the grant from the State of Georgia to Isaac Briggs. The objection to the admissibility of the document as evidence, did

not rest upon the fact that a copy was offered. That was a matter of consent, the original being present, and probably too much mutilated for convenient use.

1. Plaintiff in error presents three objections against the validity of the grant. First, that it does not appear on the face of the grant that the survey had been advertised according to Law. We do not hold that a recital in the grant of the advertisement of the survey, according to Law, is necessary to its validity. The Act of the 22d February, 1785, which requires the advertisement, provides that "no grants shall be signed till the survey has been advertised by the Surveyor of the County, at least three months, *after it has been recorded by the said County Surveyor.*" It is directory to the Surveyor and to the Governor, who is to "*sign*" grants. It is to be presumed, in reference to each grant "*signed*," that the Governor, before signing, required evidence that the Surveyor had performed this duty. It may be questioned, moreover, whether the 2d section of the Act of 18th of February, 1786, which repeals so much of the before mentioned Act as requires the Surveyor to record surveys made in his office, does not dispense also with the advertisement, which he was required to make "*after it (the survey) has been recorded by the Surveyor, &c.*" But, independently of this last view, we think the objection untenable.

The second objection, that the names of the chain-carriers do not appear upon the plat, was waived upon the discovery that the act requiring this was passed after the date of the grant in question.

2. The second objection to the validity of the grant in question, was most strongly urged, and is certainly the most serious, viz: That this grant was issued for five thousand three hundred acres, whereas the Law provides that "the quantity of land granted and sold to any one person, shall not exceed one thousand acres." It is a matter of public notoriety, that during the operation of the above restrictive clause, it was the custom of the Governors of the State, to issue grants for quantities of land larger than one thousand acres. Previous to the Act of December 24, 1836, the Governor, by authority of Law, exercised not only Executive power in issuing Grants, but also appellate Judicial power whenever, by caveat, the applicant's right to a grant was contested. These considerations suggest the probability, that

the practice of issuing grants for quantities exceeding one thousand acres, (in seeming violation of the above quoted provision of the Act of 1783) rested upon some authoritative, contemporaneous construction of the whole Law governing grants, upon head-rights and bounties. Even at this remote day, we can see reasons which may have led to such construction. It is apparent from a perusal of the numerous Acts relative to head rights, from the year 1777 to the end of that century, (see Cobb's Digest, pp. 660 to 675,) inclusive, that great precision of language was not used in all cases. "Grants" and "land granted," are sometimes spoken of when the context clearly shows, that the language used is applied to cases wherein the procedure had not gone beyond the issue of a warrant, or at most the making of a survey under it. On page 667, such tract or tracts of land as the Justices of the County "shall think fit to *grant*," are spoken of. And again, on page 660, those Justices are referred to as having "met and convened for the purpose of *granting* lands." Now, their powers never extended beyond the issue of warrants for the survey of lands, preparatory to the issue grants by the Governor, and the holding of Courts to try *caveats*. They never *granted* lands. It is worthy of note, also, that the first instance above cited, of the improper use of the word "grant," occurs in the same act which contains the restrictive clause here relied upon. The restriction is a proviso to the first section of the Act of 1783, (p. 665,) which authorizes each male citizen to take up, free of charge, (except fees) on his own account, two hundred acres, and then to purchase at a stipulated price, fifty acres for every head right in his family. It is clear, then, that the proviso was intended as a restriction upon the privilege of the citizen, not upon the granting power of the Executive. It was a limitation of the number of acres for which a warrant of survey might be issued. It has been argued, that the survey must conform in quantity to the warrant, and the grant to the survey; and that, therefore, the limitation put upon the warrant, is, in effect, a limitation upon the grant. Not necessarily, as we shall see. Those warrants of survey, after having been located, and, I believe, before location, were transferable, as is recognized by the 5th section of the Act of June 7, 1777—p. 662. What, then, would prevent the transferee of several warrants located, or unlocated, to have

a consolidated survey and plat of them, and a grant in his own name, provided he adduced satisfactory evidence that the original warrants had been fairly and legally issued and transferred.

By the Act of 25th December, 1794, the Legislature prohibited the renewal of transferred warrants, and the survey of land under them, or such of them as bore date anterior to a day specified. This Act would seem to introduce a new rule to abolish the practice of consolidating grants, but it was passed subsequent to the date of the Grant before us.

This precise question was considered, and decided by the Supreme Court of the United States in the case of *Patterson vs. Wynn*, 11th Wheaton 380. We concur in the view taken in that case. This Court also, in the case of *Burkhalter vs. Edwards*, 16 Geo. 593, recognized *arguendo*, an existing practice of consolidating lands previously *granted*, and taking a new grant for the whole.

We, therefore, find no error in any ruling of the Court touching this Grant.

It appears from the Bill of exceptions, that the defendant in the Court below put in evidence a deed from Isaac Briggs, the grantee, to Thomas Smith, which was not objected to. He next offered, in evidence, a deed from Thomas Smith to William Patterson, dated 19th May, 1798, upon the depositions of one Moule and one Williams, showing that the subscribing witnesses to the deed were dead, and affording some evidence as to their signatures as such witnesses. Plaintiff below objected, first, because the witnesses did not testify to a knowledge of the hand writing of *both* subscribing witnesses to the deed; and, secondly, because the hand-writing of the grantor was not proven. The testimony offered sufficiently proves the hand-writing of one of the subscribing witnesses, if not of both. Neither witness examined testifies to having seen the subscribing witness, Sulmore, write, but both testify to their familiarity with his signature as President of a Bank, and as a Justice of the Peace, and profess to know his hand writing and signature. We incline to think the proof of execution was sufficient to carry the deed to the Jury. But we affirm the Judgment of the Court, admitting this deed in evidence, on the ground that it was more than thirty years old, and was found in the proper custody, accompanying other deeds, together constituting a chain of title.

This, in the absence of any suspicious appearances upon its face, made it admissible without proof of execution. In such a case, the Law presumes every thing necessary to its admission.

4. Defendant in the Court below offered, in evidence, an exemplification of the last Will and Testament of William Patterson, and plaintiff objected, on the ground that the Will had never been admitted to probate and record in the State of Georgia. The objection was overruled, and plaintiff's counsel excepted.

This document does not appear in the brief of evidence, but in the bill of exceptions, the counsel of plaintiff in error states that it "was admitted to probate and record in the county of Baltimore, State of Maryland," and that it "was duly certified as an exemplification from another State."

Upon this statement, (not having an inspection of the paper,) we cannot escape the conclusion that this exemplified copy would be received in evidence by the Courts of Maryland, as a muniment of title. The Act of Congress on this subject, provides that such papers "shall have such faith and credit given them in every Court within the United States, as they have, by Law or usage, in the Courts of the State from whence the same are or shall be taken." Hence, it results that probate and record in Georgia, was not necessary to make this Will evidence as a muniment of title to real estate in Georgia, and the objection was, therefore, not well taken.

Other deeds were offered, bringing the chain of title down to the defendant's, and objected to on divers grounds, and the Judgment of the Court, overruling each objection, is excepted to.

We deem it unnecessary to consider these exceptions, because, even if we should find error in any of these rulings, we could not, for that cause, set aside the verdict and order a new trial.

The plaintiff, below, put in evidence a grant from the State of Georgia, executed in the year 1836, as the foundation of his title. It was a legitimate defence for the defendant to show title out of the plaintiff. This he did effectually, by showing that the State of Georgia had granted the same land to Isaac Briggs in the year 1787, and by adducing title from Briggs to the devisees of Patterson, bringing this chain of title regularly down to a late day, and thus rebutting all pre-

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sumptions of escheat, or forfeiture of the lands by the first Grantee or his assigns. The result is, that the evidence which we have adjudged, properly admitted, shows title under the older grant in the devisees of Patterson, and, therefore, shows title out of the plaintiff.

The Judgment of the Court below is affirmed.

JUDGMENT.


Wherenpon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

JOHNSON vs. REESE.

The provisions of the Judiciary Act of 1799, making it the duty of a Sheriff to advertise his sale of property seized under execution, in three of the most public places in the county, has not been repealed by subsequent legislation, but is still of force, and if he neglects to perform this duty, and injury results therefrom, he is liable therefor, to the extent of the damages sustained.

Trespass on the case, in Glasscock Superior Court. Decision on Demurrer to plaintiff's declaration, made by Judge THOMAS W. THOMAS, at the August Term, 1860.

Asa Johnson instituted his action in Glasscock Superior Court, against Augustus C. Reese, alleging: That on the 1st day of January, 1858, in said County, he was lawfully seized, as of his own right, of a tract of land containing 200 acres, more or less, adjoining lands of Thomas Dickerson, Jerusha Kent, and others; that the defendant, under color of the office of Sheriff of said County, did seize and sell the same without lawful authority, to the damage of the plaintiff one thousand dollars; that the defendant put up and sold said land to the highest bidder, without leaving notice with the



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plaintiff of the levy thereon; and did sell said land before the Court-house door, on the first Tuesday in July, 1858, without advertising said sale, according to Law in such case, made and provided; that no notice of said sale was given, in the said county of Glascock; that when and after said land was exposed to sale, the same was knocked off to one Edward A. Brinkley, against the protest of the plaintiff, for four hundred dollars, when it was really worth one thousand dollars, and would have sold for said sum of one thousand dollars, if legal notice of said sale had been given; that after said sale, and pursuant thereto, the defendant did turn the plaintiff, with his family, out of the possession of said land, and placed the said Brinkley in possession of the same, together with the crop on the land which had been planted and cultivated by the plaintiff, and which was worth the sum of five hundred dollars; by means of all which, the plaintiff and his family were deprived of a home, and were exposed to the inclemency of the weather, and by which the plaintiff was damaged one thousand dollars.

To this declaration the defendant filed a demurrer, on the grounds—

1st. Because the declaration contains no cause of action.

2d. Because the declaration does not allege any cause of action, or show that the plaintiff suffered any damage or injury prior to the commencement of his said suit.

3d. Because it was not necessary to the legality or validity of the sale of the land, that notice of the levy should have been given to the plaintiff, or that notice of the sale should have been given at three of the most public places in the county of Glascock, and that the sale of the land was valid.

After argument had thereon, the presiding Judge sustained the demurrer, and dismissed the plaintiff's action, and it is to reverse that decision, that the writ of error in this case is prosecuted.

E. H. POTTLE, for the plaintiff in error.

WASDEN & NELMS, for the defendant in error.

By the Court.—LYON, J., delivering the opinion.

The defendant, as Sheriff of the county of Glascock,

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seized and sold a tract of land, as the property of the plaintiff, under execution, but failed to advertise the sale in three of the most public places in the county, as required by the Judiciary Act of 1799. (*Cobb's Dig.*, 509.) This action was brought by the plaintiff, against the defendant, to recover damages sustained by means of such neglect of duty. On the hearing, the Court below awarded a non-suit, to which plaintiff excepted. And the only question for our consideration is, whether the provision of the Act of 1799, referred to above, has been repealed by subsequent legislation, either expressly or by implication? If it has, then the judgment of non-suit was properly awarded; if not, the judgment was erroneous.

It is conceded that the identical question made in this case, was fully discussed, and actually decided, by this Court in *Johnson vs. Reese*, (same parties, though a different case.) 28 *Ga.*, 355; but it is urged by counsel that, while this is true, the question made here now was not really in that case, or rather the judgment of the Court there did not at all depend on this question. And we agree with the counsel, that the real question in that case—which was, whether the purchaser, at the sale, got a title to the land or not—had nothing to do with the adjudication of the one before us now, and the adjudication of this, at that time, was unnecessary, and really not before the Court. Hence, we do not feel concluded by it, but shall decide the question precisely as if it was made now for the first time.

The provision of the Act of 1799, on which this action is founded, is in the following words:

“No sales in future shall be made by the Sheriff of property taken under execution, but on the first Tuesday in each month, and between the hours of ten and three in the day; and it shall be the duty of the Sheriff to give thirty days notice in one of the public gazettes of the State of all sales of land and other property executed by him, and also advertise the same in three of the most public places in the county where such sales are to be made, and shall give a full and complete description of the property to be sold,” &c.

The Act of 1839 (*Cobb*, 286) requires the Sheriff and her officers to keep in their respective offices a regular file of the newspaper in which they may advertise the notices required by Law to be advertised, but no change of advertising made.

The next Act on the subject, to which we are referred, is an Act, entitled, "An Act to authorize and require the Sheriff, &c., to advertise in certain newspapers." Approved February 22d, 1850, by which it is enacted:

"That the Sheriffs, &c., are hereby authorized and required to advertise their sales, &c., in some newspaper published in their counties respectively; and if there be no such paper published in the county, then in the nearest newspaper having the largest, or a general circulation in the county."

By the Act of 1799, the Sheriff was required to give thirty days notice in some public gazette of the State. The Sheriff, by that Act, could have complied with the Law by a publication of his sales in any newspaper of the State, whether a single copy was taken in the county or not. The object of the advertisement was to give publicity to the sale, so that the competition might be as large as possible, they benefitting both the debtor and creditor in the sale of the property. The provision of the act of 1799 did not accomplish that object, or at least it might be complied with by the Sheriff, and the object of the Law not attained. The Act of 1850 was intended to remedy that defect, and the only change made by that Act was as to the newspaper in which the notice was to be given, all the other provisions of the Act remaining of force.

The next Act on this subject, and the one which is relied on by counsel for defendant, as repealing, by implication, the provisions of the Act of 1799, requiring advertisements at the three most public places in the county, is that of 1852, entitled, "*An Act to regulate the advertising of Clerks, Sheriffs and other State and county officers,*" &c. Approved January 22d, 1852.

Section 1 enacts, "That from and after the passage of this Act, the Clerks, Sheriffs and other State and county officers of the State of Georgia shall be authorized and empowered to publish their advertisements in any newspaper they may select, having a general circulation in their respective counties or districts."

Section 2, general repealing clause.

The only effect of this Act was, to repeal the provision of the Act of 1850, that required the advertisements to be made in a newspaper published in the county where the sale was to be made, or in the nearest having the largest, or gen-

oral circulation in the county, and instead thereof, to authorize the officers to advertise in any paper they might select, restricting them only to some paper that had a general circulation in the county where the sales were to be made. The Act did not repeal the provisions of the Act of 1799, requiring the sale to be advertised at three of the most public places in the county, nor in any wise dispense with or abrogate that duty on the part of the Sheriff, nor are those provisions in conflict or inconsistent with the terms of the Act of 1852; but they are in as full force and as binding on the Sheriff, as a duty, as if no such Act had been passed.

Great stress was laid, in the argument, on the fact, that the title of the Act of 1852 is, "*to regulate the advertising of Clerks and Sheriffs*," from which, as argued, appears the intention of the Legislature as to the whole duty of those officers in advertisements; that in regulating the advertisement, they then prescribe all the duties required of the officer in this respect; in other words, as the Legislature, by that Act, regulated the duty of Sheriff, in advertising their sales, a compliance with the provisions of that Act is a full performance of their whole duty in that respect; and all Acts requiring other or additional duties, conflict with that Act, and are void.

The answer to the argument is, that the title is no part of the Act, and resort can be had to it only for the purpose of ascertaining the intention of the Legislature where the body of the Act itself is so obscure and uncertain that the intention cannot be ascertained from it. In the body of this Act there is no obscurity or ambiguity whatever, but the sense is plain and manifest, that the only change made or intended upon the old Law, was as to the newspaper in which the notice of the sale was to be made. But let us look at the word as though it constituted a part of the body of the Act, and is to be considered as well as all the balance of the Act, to get at the sense of the Legislature. Was it used in the broad sense claimed for it by counsel for the defendant? Most certainly not; for that would be to dispense with the length of time the advertisement was to run, prior to the sale, the description of the property to be sold, and the names of the parties to the proceeding; all of which are prescribed by the Act of 1799, and are to be found nowhere else. It surely could not be contended that the Legislature intended

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that these important requirements should be dispensed with, or that a Sheriff had discharged his duty who had neglected them in the sale of a defendant's property; yet, if we should hold that this Statute repealed the one thing, we should, by the same rule, and for the same reason, be compelled to hold that it also repealed the other requirements; for the Act is "to regulate the advertising," and if it regulates as to one thing other than that expressly named in the Act, it must as to all things. We cannot so hold. On the contrary, we must construe that word in the confined sense in which the Legislature manifestly intended it, as applied only to the newspaper in which the notice should be given, leaving all other regulations as to the Sheriff's duty in advertising of force, and undisturbed thereby.

I will briefly notice some of the other arguments used by the ingenious counsel for the defence: These are, that this provision of the Act of 1799 has become obsolete—is disused throughout the State; that the reason and necessity for their enactment has long ceased to exist, because at the time of that enactment there were but few papers published in the State of Georgia, and they had but a very limited circulation; that then, if the notice was given only in a public gazette, very little, if any, publicity would be given of the sale to those who would likely desire to become purchasers; hence, the necessity of requiring notices to be posted at public places in the county. To all this we reply, that an Act of the Legislature never becomes obsolete, but is always in full force and vigor until repealed by the Legislature; that the willful and deliberate neglect by an officer, or officers, of a plain and positive duty, under a Statute, can never justify the above, no matter how long-continued or how universal such neglect may be. Whether the reason and necessity of the Law has ceased, involves the whole question in this case. The Statute makes it the duty of the Sheriff to give the notices. The object is, to give publicity to the sale, so that the defendant's property shall not be sacrificed for the want of a knowledge of the sale by persons who would likely become purchasers or competitors therefor, in the sale. If all such persons have, or had notice of the sale, although it was not posted at the three most public places in the county, then the plaintiff has sustained no injury; but that is a question to be determined by the Jury, on the proof made. The con-

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tinuance of a Statute does not depend on the continuance, or even the existence, of a reason. The reason may cease, or it may never have existed: the officer of that law is bound, nevertheless, to obey its commands; and if he fails to do so, and injury results, he must respond to the extent of the injury sustained. For these reasons, we think the demurrer ought not to have been sustained.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in sustaining the demurrer to the plaintiff's declaration and dismissing his said suit.

DENNIS vs. SHARMAN et al.

A payment made by a debtor to one who is a merchant, on a note then due to him, on the Sabbath day, is not such acknowledgment of the debt as from which the Law will presume a promise to pay sufficient to take the case out of the Statute of Limitations. The transaction being in violation of the Law, no binding promise, either express or implied, will be presumed therefrom, to prevent the statutory bar from attaching to the debt.

Assumpsit, in Hancock Superior Court. Tried before Judge THOMAS, at the October Term, 1860.

James B. Nickelson brought suit against James H. Willey, Thomas C. Grimes, and James T. Johnson, alleging that, as partners, using the firm name of Willey, Grimes & Co., they were indebted to him the amount due on the original note, of which the following is a copy, with the credits thereon, to-wit:

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"GREENESBORO', Ga., Oct. 24th, 1837.

"On or before the 1st day of January, 1840, we promise to pay James B. Nickelson, or bearer, eight thousand nine hundred and fifty dollars, with interest from date, for value received.

WILLEY, GRIMES & CO.

"1st March, 1842, received on the within note, by James H. Willey, eight hundred and ten dollars and fifty-six cents, it being his interest in the notes and accounts, of the firm of Nickelson & Willey.

J. B. NICKELSON.

"1st March, 1846, received of the within note, one hundred dollars.

JAS. B. NICKELSON.

"28th January, 1852, received one hundred dollars on the within.

JAS. B. NICKELSON."

To this suit the defendant set up the pleas of the general issue, and the Statute of Limitations.

Pending the action, both the plaintiff and the defendant Grimes, who alone was served with process, died, and William T. Sharman, administrator, and Ann M. Nickelson, administratrix of James B. Nickelson, were made party plaintiffs, and Michael Dennis, administrator of Thomas C. Grimes, was made party defendant.

On the trial of the case in the Court below, the following testimony was adduced:

Evidence for Plaintiff.

The note sued on, with the credits on it, was read in evidence.

JAMES H. WILLEY, in answer to interrogatories, testified: That the credits on said note were *bona fide* for value received; that Nickelson, the payee, received the first two payments from the witness, and the third payment from George L. Willey, by the directions of witness; that witness, Thomas C. Grimes, and James T. Johnson, composed the firm of Willey, Grimes & Co., which was formed in October, 1837, and was dissolved about one year thereafter; that witness and said Johnson formed a partnership, under the firm name of Willey & Johnson, which was dissolved within two years; that witness then did business by himself; that afterwards, witness

and Nickelson formed a partnership under the firm name of Willey and Nickelson; that when Willey, Grimes & Co. dissolved, the goods on hand went into the concern of Willey & Johnson, and a portion of them afterwards went into the concern of Willey and Nickelson; witness and all these firms carried on business at the same place, being Nickelson's old stand; that when Willey, Grimes & Co. dissolved, Grimes did not draw any money from the firm, or take possession of the books, as the terms of dissolution were, that Willey & Johnson were to pay off all the liabilities of the firm of Willey, Grimes & Co.; that the credits on the note were made after the dissolution of the firm of Willey, Grimes & Co.; that the payment on the note of March 1st, 1846, was made at the desk, at the side window of the store; that witness and Nickelson's wife are brother and sister.

GEORGE L. WILLEY, in answer to interrogatories, testified: That some time between the middle of January and the first of March, the witness remitted from Madison, one hundred dollars, to be credited on a note held by Nickelson against Willey, Grimes & Co.; that the remittance was made by the directions of James H. Willey, in the year 1852, and witness does not know whether the amount was ever credited on the note or not, never having seen the original note.

THOMAS CUNNINGHAM, in answer to interrogatories, testified: That Thomas C. Grimes called on witness, who was the agent of the Southern Mutual Insurance Company, to have the life of James H. Willey insured for ten thousand dollars, giving, as a reason for so doing, that his friends were bound for said Willey to a large amount; that witness understood him to refer to the debt in favor of Nickelson against Willey, Grimes & Co.; that this occurred on the 3d of January, 1850; that Grimes did obtain insurance of the life of said Willey to the amount of five thousand dollars, which was as high as the Company would go; that Grimes said that as Willey was a speculating, trading man, he might be able to pay it if he lived a few years; that Grimes gave, as a reason for wanting the insurance, that he was bound for a large amount for Willey; that Grimes has told witness that he had not received any consideration for said debt, and that he did not consider himself liable to pay it, and would not pay it unless compelled to do so by Law.

GEORGE O. DAWSON testified: That he was well acquainted

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with James B. Nickelson; that he was a merchant in Greensboro', and esteemed and respected as a correct man; that he did not often attend church on Sunday, but remained about his store; that the first and last credits on the note are in the hand-writing of Nickelson, but the second credit is not in his hand-writing; that it may be in James H. Willey's hand-writing, but the witness does not know Willey's hand-writing well enough to determine.

Evidence for Defendant.

The cash-book of James B. Nickelson and an Almanac for the year 1846.

ISAAC L. WHITTEN, in answer to interrogatories, testified: That a short time after James H. Willey sold out his store to James B. Nickelson, Thomas C. Grimes told witness that such a sale had occurred, and that Willey had gone to Madison, and that he wanted witness to go to Greensboro' and look through the business, and trace out their transactions, and ascertain whether he (Grimes) was liable to Nickelson on an old mercantile transaction between Nickelson and Willey, Grimes & Co., which was entered into in 1837: pursuant to this engagement, witness went to Greensboro' on the evening before a day set apart by letters of Grimes to Willey and Nickelson, and announced to Nickelson the object of his visit; Nickelson said he was aware of witness' coming, and that he would be ready next morning; that witness called next morning and found him busy; that witness again called and found him busy, and repeated his calls until about one o'clock; that Nickelson told him that there was no necessity to go through the transactions, as Grimes was in no danger; in answer to many questions by witness, Nickelson said, that the original indebtedness was between eight and nine thousand dollars, but it had been reduced by credits; that he had purchased back the house and lot, and stock of goods, and that he had loaned Willey money to carry on the business while he was selling goods, which amount was first taken from the price of the goods purchased back, and the house and lot was taken back at twenty-five hundred dollars, and that there was then a credit to go on the note of twenty-four hundred dollars, which witness thinks was for the house and lot; Nickelson further stated, that he had neglected to place

the credit on the note, but that he would have it done; that in addition to this, Willey had left in his hands an abundance of good notes and available assets to pay off the entire debt, and that as fast as they were collected, the credits should be entered on the note, and that witness might go home and assure Grimes that he was in no sort of danger, and need not be uneasy; that witness' interrogatories are taken in this case because he has been diseased fourteen or fifteen years, with indigestion, debility, frequent and violent catarrhal affections, nervous headache, with morbid excitability, and very irregular action of the heart and arteries, and did not think that he could rely with any certainty on being able to attend Court in person; that he is general agent for Mrs. Grimes, now Mrs. Dennis, in the management of the affairs of her husband's estate; that previous to her intermarriage with Dennis, she lived with witness, whilst he kept the books and papers of the estate, he consulted with her, and informed her generally of what was done; that the conversation with Nickelson was in 1842.

The witness stated many other things which are deemed immaterial to the issues of this case, and which are therefore omitted. The plaintiff, for the sole purpose of rebutting the evidence of Whitten, introduced the record of a case in Equity in Greene Superior Court, between the parties, but the record is neither copied in the bill of exceptions, or its substance stated, and cannot, therefore, be set out here.

The testimony being closed, counsel for defendants requested the presiding Judge to charge the Jury, that "if they believed the payment on the note, endorsed as having been made on the 1st of March, 1846, was made on that day, and it was the Sabbath day, it could not raise a binding promise to pay the debt, so as to take it out of the Statute of Limitations."

This charge the Judge refused to give, and counsel for defendant excepted.

The presiding Judge, amongst other things, charged the Jury:

"That it was not necessary for the promises to pay the debt to be in writing, and that the Statute of Limitations of 1856 did not apply to this case; but if the payments were made on the note, by either of the parties in the firm of Willey, Grimes & Co., at the time they are dated, and within

the Statute of Limitations, the Law will imply a promise to pay, and it need not be written."

To this charge defendants excepted.

The Jury returned a verdict in favor of the plaintiff, for the amount of the note sued on.

Counsel for the defendant then made a motion for a new trial, on the following grounds, to-wit:

1st. Because the Court erred in refusing to charge as requested by counsel for defendants, as hereinbefore set forth.

2d. Because the Court erred in charging the Jury as hereinbefore stated.

3d. Because the verdict for the plaintiff is decidedly and strongly against the weight of evidence.

4th. Because the verdict is contrary to Law.

The presiding Judge overruled the motion, and refused the new trial. This decision is the error alleged in the record in this case.

T. R. R. COBB, and WASDEN & NELMS, for plaintiffs in error.

TOOMBS, and A. H. STEPHENS, for defendants in error.

By the Court.—LYON, J., delivering the opinion.

The main issue between the parties in this case is, Whether the cause of action of defendants in error was barred by the Statute of Limitations at the commencement of the suit? and that depends, for the present, at least, upon the question, Whether the credit endorsed on the note sued upon, of the date of 1st March, 1846, of one hundred dollars, is such an acknowledgment of the existence of the debt, at that time, as from which a valid promise to pay the debt, either expressly or by implication, may be presumed, so as to constitute a new point, from which the Statute should then begin to run anew?

It is claimed by the plaintiff that it is not, for two reasons:

1st. That no such payment was in fact made at that time.

2d. That if the payment was actually made, that it was made on Sunday—the first day of March, 1846, being the Sabbath day—and that no binding promise to pay the debt, either expressly or by implication, could be raised from a

payment on that day, either to take the case out of the Statute of Limitations, or to make a new point from which the Statute should begin to run, but that such acknowledgment, however explicit for that purpose, was void and of no effect.

The first question is one of fact, and therefore more appropriately for the consideration of a Jury; and as there is a conflict of evidence on the point, we deem it best not to express our opinion on it, especially as we shall send the case back on another point, when the same question will, or may, be submitted to another Jury.

As to the second question on that point, the plaintiff in error requested the Court below to charge the Jury, that "if they believed the payment on the note, endorsed as having been made on the first March, 1846, was made on that day, and it was the Sabbath day, it could not raise a binding promise to pay the debt, so as to take it out of the Statute of Limitations." This charge the Court refused to give, and this refusal forms the main ground of complaint to the rulings of the Court in this case.

The legal effect of a partial payment on an existing debt by a debtor is, not only to reduce the amount of the debt to that extent, but from that Act the Law implies an acknowledgment that the whole debt is due and owing, and from this acknowledgment a promise of payment is presumed, that is binding on him who makes the payment, as well as all others standing in the same relation to the debt as himself. It is upon this principle or presumption, and none other, that a valid partial payment constitutes a new point from which the Statute of Limitations must run, instead of from the time when the debt first became due. And it is now too firmly established by judicial precedent to be shaken or overturned, although it has been gravely doubted by the most eminent judges and lawyers as an innovation by the Courts on the Statute of Limitations. But do these legal consequences or presumptions flow from a partial payment made on the Sabbath day? Whether they do or not, depends entirely upon the question, whether the act so done on that day is prohibited by Law? for if the act—that is, the payment on that day—was in violation of, or prohibited by, Law, then all contracts, obligations and promises, either express or implied, growing out of, or dependant on, the act, is null and void, whether so declared to be by the Law of which the act was

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in violation or not. This has been the uniform ruling of the Courts, where the Common Law is of force, since *Drury vs. Defontaine*, 1 Taunt., 135, where it is said by Lord Mansfield, "if any act is forbidden under a penalty, a contract to do it is now held void," and such has been the constant doctrine of this Court. A familiar instance, of which may be seen in the many adjudications in respect to the Statute of 32 Hen. VIII, or "*The bill of Bracery or Buying of Titles*," as it is sometimes called. That act does not declare deeds made in violation of its provisions to be void, but affixed a penalty to the making or buying titles adversely to the possession. This Court uniformly held the deeds to be void, not because the Law declared them to be so, but because the act was prohibited. If an act is prohibited or a penalty affixed by Statute to the doing of an act, no valid contract, obligation or promise can be entered, into, created or made, either expressly or by implication, that has its foundation in the violation of such Law. The case put by counsel in the argument, under the Law against Usury, is not an exception; for in that case, it is only the interest that is declared to be void; the principal is expressly authorized by the Statute to be recoverable. Now, was this payment of 1st March, 1846—that being the Sabbath—a violation of any law then in force in this State? We are clear that it was. The first clause of the second section of "An Act for preventing and punishing vice, profaneness and immorality, and for keeping holy the Lord's day, commonly called Sunday," approved March 4th, 1762, is in these words:

"No tradesman, artificer, workman, laborer or other person whatever shall do or exercise any worldly labor, business or work of their ordinary callings on the Lord's day, or any part thereof; (works of necessity or charity only excepted;) and that every person being of the age of fifteen years and upwards, offending in the premises, shall, for every such offence, forfeit the sum of ten shillings."

Nickelson, the defendant's intestate, to whom the payment was made, and to whom the note belonged, was at the time a merchant in the town of Greensboro', and the payment was made to him by Willey, on the 1st March, 1846, at the desk of Nickelson, in his store; and the further proof is, that that day was the Sabbath day. The cash-book of Nickelson, that was in evidence, shows that he was daily (Sundays

excepted) in the habit of receiving, collecting and paying out money; that was his ordinary calling—his daily business. The receipt of this money on this note by Nickelson, as a payment to him, was in the exercise of his worldly business; was a work of his ordinary calling—not of charity or necessity, and was therefore plainly and emphatically within the letter and spirit of the Act which it intended to prohibit and suppress. Hence, according to the rule we have stated, no valid and binding promise to pay the debt, either expressly or by implication of Law, can be presumed from such illegal act; or if a new promise can be presumed, it is null and void, and does not take the case out of the Statute of Limitations, or constitute a new point from which the Statute should begin to run.

The Statute of 29, *Car. II, chap. 7*, § 6, enacts that “no person whatsoever shall do, or exercise, any worldly labor, business or work of their ordinary callings upon the Lord’s day.” Under that Statute, the British Courts have uniformly held, that all contracts or obligations made on that day, or which grew out of, and depended upon, acts done upon that day, in violation of the Statute, were void, and could not be enforced. There has been some difference, at different times, and by different Judges, as to what acts done on that day were within the prohibition: for instance, it was held in some of the cases, perhaps the majority, that unless the act done, out of which the contract grew, was of the ordinary calling of the party to be affected by the act, that the contract was not void. In others, again, it was held that all contracts based upon acts done on the Sabbath day, of a worldly business, were void, (unless of charity or necessity,) whether of the ordinary callings of the parties or not. See *Drury vs. Defontaine*, 1 *Taunt.*, 185; *Tennell vs. Ridler*, 11 *Eng. C. L.*, 261; *Smith vs. Sparrow*, 12 *Eng. C. L.*, 253; 52 *Eng. C. L.*, 479. It is altogether unnecessary to inquire which class of these decisions is the better construction of the Statute, as either of them is equally fatal to the defendants in error. Similar Statutes to that of 29 *Car. II, ch. 7*, § 6, and of ours of 4th March, 1762, to enforce an observance of the Sabbath, have been passed by many of our sister States, and in all of them, I believe, when the question has been made, the Courts have held contracts made on that day to be void, whenever the acts done on which the contract depended

were prohibited by the Statute. *O'Donnell vs. Sweeney*, 5 Ala., 467; *Dodson vs. Harris*, 10 Ala., 568; *Saltmarsh vs. Tuthill*, 13 Ala., 402; *Hussey vs. Roquemore*, 27 Ala., 289; *Bumgardner vs. Taylor*, 28 Ala., 678; *Towle vs. Larrabee*, 26 Maine, 468; *Frost vs. Hill*, 4 N. H., 157; *Lyon vs. Strong*, 6 Verm., 219; *Wright Geer*, 1 Root, 474; *Fox vs. Abel*, 2 Conn., 584; *Story vs. Elbert*, 8 Con., 27; *Adams vs. Hamell*, 2 Doug., (Mich.) 73; *Sink vs. Clement*, 7 Blkford, 479; *The City of Cincinnati vs. Rice*, 15 Ohio, 225.

But it is insisted that this was not a contract—not an obligation to pay money, growing out of any agreement then made to do so, or of a thing done in violation of the Sabbath day, but that it was a mere admission that the debt was then due; that it had not been paid, and that it was as competent to make such admission on that day as any other, and that when so made, it was as competent and legal to use such admission against the parties, as evidence of the existence of the debt at that time, as though it had occurred at any other time, and that to hold otherwise, is to hold that a party could not tell the truth on Sunday.

If it was true that the defendants only proposed to use the credit as evidence of an admission that the debt was then due and had not been paid, but was an existing debt, there could be no serious objection to it for that purpose; but that is not the use proposed to be made of this credit, but a much more important and extended one; and that is, as an acknowledgment of that character from which, in the eye of the Law, a promise to pay the balance of the debt is presumed. As proof of the existence of the debt at the date of the credit, it was valueless; for it was a debt without the credit. It had not been paid, or barred by the Statute, and so it could have been made to appear, whether a payment was made or not. The argument of counsel rests on the idea that anything that negatives the idea of payment, excludes the operation of the Statute from the time the debt is proved to be in existence. Such an idea is altogether fallacious, for, if allowed, it would wholly defeat the Statute. This argument is in accordance with what the Courts at one time held, that an acknowledgment defeated the Statute by repelling the presumption of payment. Upon this construction it was held that an admission would prevent the bar, although it was coupled with a refusal to pay and a distinct avowal to claim the benefit of

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the Statute; but such a principle has long since been exploded, and it is now fully established that an acknowledgment to prevent the operation of the Statute, must be so made as to amount, in the eye of the Law, to a new promise, or from which the Court can presume a promise. *Ang. on Lim.*, 218; *Tillinghast Bal.*, 190; *Prince vs. Boisselet*, 9 *S. & R.*, 131; *Hudson vs. Carey*, 11 *id.*, 10; *Baily vs. Baily*, 14 *id.*, 195; *Dean vs. Pitts*, 10 *Johns. Rep.*, 195; *Johnson vs. Beardslee*, 15 *Johns.*, 4; *Martin vs. Williams*, 17 *id.*, 331; *Bangs vs. Hall*, 21 *Pick.*, 323; *Perley vs. Little*, 2 *Greenl.*, 97; *Atwood vs. Colburn*, 4 *N. H.*, 315. From these authorities it is safe to say, that mere proof of the continued existence of the debt does not stop the running of the Statute, but the acknowledgment must contain an express promise to pay, or be so unequivocal that the Law will imply a promise; so that at last it is the promise, whether express or implied, that saves the case from the operation of the Statute, and nothing short of that. If, then, the promise relied on to take the case out of the Statute is made or inferred from an act done in violation of a public law, as this was, such promise is void, or rather the Law will not presume a binding promise from such illegal act. The identical question involved in this case was decided by the Supreme Court of the State of Alabama, in *Bumgardner vs Taylor*, 28 *Ala. Rep.*, 757. In that case, suit was brought on two notes, to both of which the Statute of Limitations was plead. The plaintiff, to take the case out of the Statute, proved the promise of the defendant to haul cotton to pay the notes. The promise was made on Sunday, and at the time, the statutory bar had attached to one of the notes; to the other it had not, but had before suit brought. On these facts, the Court held—WALKER, J.: "The only question of this case which it is necessary for us to notice is, whether a promise made on Sunday will take a contract out of the Statute of Limitations? So far as this question is concerned, then, there is no distinction between a promise made in the words of the party and the promise which is implied from a distinct admission of the justness of the debt and a liability to pay it. It would be unreasonable to place the promise inferred from an admission upon a more favorable footing for the creditor than a promise distinctly and designedly made." And after reciting the decision of that Court in *Hussey vs.*

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Roquemore, 27 Ala., 289, the Court adds: "The question in this case is settled by the principle involved in that decision, and that the judgment of the Court below, ruling the promise void and ineffectual to take the case out of the Statute of Limitations, because made on Sunday, should be affirmed." In *Hussey vs. Roquemore*, the debtor promised an agent of the plaintiff, on Sunday, at church, that if he would not sue him on the plaintiff's debt to the next Term of the Court, he would pay it. The plaintiff acted on this promise, and did not sue. Subsequently, on suit brought, the plaintiff relied on this promise. The Court decided that it was void, and not binding on the defendant, because made on Sunday, in violation of a Statute of that State that prohibits all "worldly labor, business or employment, ordinary or servile work (works of necessity and charity only excepted) on the Christian Sabbath;" to which is affixed a penalty of two dollars for each offence against the same.

Counsel for the defendant in error refers to *Sanders vs. Johnson*, 29 Ga., 528, as an adjudication of the question involved in this case. We do not think so. The decision in that case was put upon the ground expressly, that the case was not within the provisions of the Act of the 4th March, 1762. This we hold to be within the letter and spirit of that Act.

The charge requested ought to have been given. If the credit was made on Sunday—and it is not denied but that it was—it cannot serve to prevent the statutory bar from attaching to the debt.

Plaintiff in error also excepted to the charge of the Court as given—"that it was not necessary for the promises to pay the debt to be in writing, and that the Statute of Limitations of 1856 did not apply to this case." But this point was withdrawn by counsel for plaintiff in error, in the argument.

JUDGMENT.

Therefore, it is considered and adjudged by the Court, that the judgment of the Court below be reversed, upon the ground that the Court erred in refusing, upon the request of counsel for defendant, to charge the Jury that if they believed the payment on the note endorsed as having been made on the 1st March, 1846, was made on that day, and it was the Sabbath day, it could not raise a binding promise to pay the debt so as to take it out of the Statute of Limitations.

CODY vs. CODY et al.

1. Three persons being sued as partners on a promissory note, signed by a firm name, and one of the three having pleaded "*non est factum*," whilst the other two made default; one of the two, so in default is incompetent on the score of interest, as a witness, to prove the liability of the party pleading *non est factum*.
2. Three persons being partners in mercantile business, evidence that one of them sold out his interest in the stock of goods on hand, but not in the notes, accounts, and other assets of the firm, to a fourth party, who formed a new mercantile partnership with the other two under a different firm, style and name, is not *per se* proof of a dissolution of the first partnership.

Debt, in Warren Superior Court. Tried before Judge THOMAS, at the October Term, 1860.

The facts and questions presented by the record in this case are as follows, to-wit:

Benjamin G. Cody brought an action against James Cody, Jesse M. Roberts and Alphonzo B. Rogers, alleging, that as partners, they were indebted to him the sum of money due upon a promissory note, of which the following is a copy:

"One day after date, we promise to pay B. G. Cody or bearer, four hundred dollars, for value rec'd. Dec. 15th, 1856.
"CODY, ROBERTS & CO."

The defendants, Cody and Rogers, set up no defence to the action, whilst Jesse M. Roberts resisted a recovery against him, on the ground: that no such firm, as that of Cody, Roberts & Co., existed at the time the note sued on was given: said firm having been dissolved on the 2d of February, 1856, of which the plaintiff had notice; that said note was not given for any debt due by said firm, or for any consideration passing or existing between the plaintiff and said firm, and that the note was executed without any authority, express or implied of the said Roberts, and is not his act and deed.

On the trial, plaintiff introduced the note as evidence, and then closed.

The defendant, Roberts, then introduced Thomas S. Hundey as a witness, who testified: That about the 6th of February, 1856, the witness purchased the interest of the defen-

dant, Jesse M. Roberts, in the stock of goods then on hand, and belonging to the mercantile firm of Cody, Roberts & Co., which had existed some time in Warrenton, and which was composed of the defendants; that after the purchase, Roberts had nothing to do with the defendants Cody and Rogers, either in buying or selling goods; but that said Cody and Rogers were engaged in business under the firm, name and style of "Cody, Rogers & Hundley;" that plaintiff was clerk for both firms, and aided in taking stock at the time witness bought Roberts' interest; the witness does not know whether the firm of Cody, Roberts & Co., was ever dissolved or not, but does know, that Roberts had nothing to do with said firm after the purchase aforesaid, except to collect and pay debts; the witness only bought the interest of Roberts in the goods, and not in the notes, accounts or other assets of the firm; the old firm kept their books in the back room of the store of the new firm, and collected and paid debts at that place; all the partners of the old firm had free and constant access to the books, and Roberts was often there, assisting in making settlements on the books; the book offered in evidence, is the cash book of the old firm, and contains entries in the hand-writing of all the partners; the last entries in it in 1858, are in Roberts' hand-writing, and so are the entries on the last two pages; witness has made entries in the cash book at the request of Roberts, and when some of the last entries were thus made by witness, Roberts said the payments were made by him out of his private fund; the sign board of Cody, Roberts & Co., remained over the store door some time after the purchase by witness of the interest of Roberts in the goods of the old firm, such a thing being common in the town of Warrenton; the note sued on was signed by the defendant Rogers.

The plaintiff then offered as evidence, the depositions of the defendant Alphonzo B. Rogers, to prove that the note sued on was given by him for money borrowed, with the knowledge and consent of the defendants to pay off a note on them in bank, and that the money was so applied.

Upon objection made, the depositions were excluded on the ground that the witness was incompetent to testify on the score of interest in the event of the suit.

The plaintiff then tendered in evidence, the record of a suit and judgment, in Warren Superior Court, in favor of John

S. Reid against Cody, Roberts & Co., founded on a note signed by Cody, Roberts & Co., of a subsequent date, to the note sued on this case, counsel for plaintiff undertaking at the same time, to show by other proof, that said judgment was paid off by the defendant Roberts.

Upon objection made, this record was also excluded. The record thus excluded is not copied in the brief of evidence.

The plaintiff also offered as evidence, a note signed "Cody, Roberts & Co.," payable to John S. Reid or bearer, for \$581.24, dated 16th of April, 1857, and due the first of December thereafter, which was likewise, upon objection made, repelled by the Court.

The testimony being closed, the presiding Judge charged the jury: "That if they believed the testimony of the witness, Handley, they must find for the defendant Roberts; and that the facts appearing from the cash book, might be considered as against the truth of Handley's testimony; but if, notwithstanding the entries in the cash book, they believed that Handley spoke the truth, and was not mistaken, then they ought to find for the defendant Roberts."

The jury returned a verdict in favor of the plaintiff, against the defendant Cody, and Rogers for the full amount of the note, and for the defendant Roberts with costs of suit.

Counsel for the plaintiff then moved for a new trial on the grounds:

1st. Because the Court erred in rejecting the depositions of Rogers offered by plaintiff as herein before stated.

2d. Because the Court erred in rejecting the record of the suit and judgment between Reid and Cody, Roberts & Co., as before set forth.

3d. Because the Court erred in the charge which he gave the jury as aforesaid.

This motion was overruled, and the new trial refused, and a writ of error in this case is prosecuted for the purpose of reversing that decision.

E. H. POTTLE, AND WASDEN AND NELMS, for plaintiff in error.

ISAAC B. HUFF, for defendant in error.

By the Court—JENKINS, J., delivering the opinion.

Cody vs. Cody et al.

This was a statutory action, brought upon a note signed "Cody, Roberts & Co.," against three persons respectively named Cody, Roberts & Rogers, who are alleged to constitute the firm represented by that name and style. Cody & Rogers made no defence, Roberts plead *non est factum*, and upon the issue presented by that plea, the case (*quo ad* the liability of Roberts,) turned. The jury rendered a verdict in favor of Roberts, and counsel for plaintiff below moved for a new trial on the following grounds:

That the Court erred in rejecting the testimony of the defendant Rogers, offered by the plaintiff to prove the liability of Roberts, on the ground that the witness had an interest, adverse to his co-defendant Roberts, which made him incompetent ;

That the Court erred in rejecting, when offered as evidence, by plaintiff, the exemplified copy of the record of a suit brought by one Reid, against the same defendants on a note signed with the same firm name, after the date of the note now sued on, wherein judgment was obtained against all the defendants ; and also in rejecting the note so sued on ; plaintiff at the same time, stating to the Court that he expected to connect with that documentary testimony, evidence that the defendant Roberts, paid that judgment. That the Court erred in charging the jury, that if after weighing all the evidence relied upon by plaintiff's counsel, as conflicting with the testimony of the witness Hundley, and with the position that the partnership had been dissolved, prior to the date of the note in suit, they believed the witness Hundley, they ought not to find against the defendant Roberts. The application for a new trial was refused, and each ground overruled. To these several rulings of the Court below plaintiff excepts.

1. There were three defendants, two of whom, Cody & Rogers, made no defence ; their liability was not contested. By the verdict of the jury, the liability to pay the note was fixed upon those two, the defendant Roberts being exonerated. But the plaintiff offered Rogers, one of those two, as a witness to establish the liability of Roberts, co-extensive with his own, and that of the other non-resisting defendant. Had this testimony been admitted, and had it satisfied the jury, that in law, Roberts was equally liable with the others, that verdict would have been rendered against the three. How would that change in the verdict have affected the interest of

Rogers, the witness? As the record now stands the *two* defendants, Cody & Rogers, are liable *inter se*, each for *one-half* the debt. In the other result, (that sought by the testimony of Rogers,) the *three* defendants would have been liable *inter se*, each for *one-third* the debt. Was it his interest to reduce his liability from one-half to one-third the debt? In legal contemplation it certainly was, and therefore the ruling of the Court below, excluding his evidence, was correct.

The exemplification of the record in the case of Reid vs. these defendants, the rejection of which, is the grievance of the second exception, does not appear in the brief of evidence. Not being a record between the same parties, but offered as evidence to establish a *fact*, which the plaintiff insists was in issue in both cases, it becomes important, in the adjudication of this point, to know what issue, or issues, were made in that case, and this we cannot know without a view of the pleadings—an inspection of the record. We therefore decline to decide this point because not properly presented in the record before us.

2. The remaining exception is to the charge of the Court, regarding the effect of Hundley's testimony. The Court very fairly directed the attention of the jury to so much of plaintiff's evidence as conflicted with Hundley's testimony; and having done so, charged them that if, notwithstanding this conflicting evidence, "*they believed Hundley, they ought not to find against Roberts.*" This is equivalent to saying, that taking the testimony of Hundley, *per se*, it was sufficient, if the jury believed him, to exonerate Roberts. Certainly no view of the question more favorable to the charge of the Court can be taken; and in this view we consider it.

The evidence establishes the fact that a copartnership had existed between the three defendants, under the firm of Cody, Roberts & Co., anterior to the execution of the note in suit. That the note was made by one of the firm in the firm-name, is not disputed. Roberts sought to evade liability by proving a dissolution of the partnership prior to the date of the note, and Hundley the witness upon whom he relies.

Does Hundley directly and in terms prove a dissolution of the partnership? On the contrary, he says, twice, he does not know that that partnership was dissolved. Does he, then, testify to any fact from which the dissolution necessarily results as an inference of Law? The defendant, Roberts, in-

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sists that he does, and relies upon this portion of the testimony briefly stated, viz :

That early in 1860, the witness bought from the defendant, Roberts, his interest in the stock of goods, held at that time by Cody, Roberts & Co., and formed a copartnership with Cody & Rogers, under the firm of Cody, Rogers & Co., which last firm carried on a trade in the same store previously occupied by Cody, Roberts & Co. That the last mentioned firm never afterwards sold goods. That in the transaction between witness and Roberts, witness did not purchase Roberts' interest in the accounts, notes and assets of the firm of Cody, Roberts & Co. That Cody, Rogers & Roberts continued to use the back room of the store-house for the purpose of collecting and paying debts, and winding up the business, in which each participated—each making entries in the books.

This evidence simply establishes the fact that at a given time, the firm of Cody, Roberts & Co., ceased to buy and sell goods—had no common property in any stock in trade as distinguished from other property. But it is apparent they had a common interest still in the fruits of that trade ; that they jointly possessed all other assets of the firm ; that they all participated in the collection of debts due them, and in the payment of debts due by them ; that they had equal access to, and control of the assets and books of the firm. Now, a partnership, after the firm cease to buy and sell goods, may well be, and often is, continued for the purpose of winding up. They often borrow money in the firm-name to facilitate the winding up.

We think, therefore, the evidence of Hundley was insufficient to exonerate Roberts—that there was error in the charge of the Court below, and for this cause reverse the Judgment.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the judgment of the Court below be reversed, on the ground that the Court erred in not granting a New Trial upon the third assignment of error in the motion for a New Trial, viz : That the Court erred in charging the jury, that if, after weighing all the evidence relied on by defendants' counsel as conflicting with the testimony of Thomas S. Hundley, and with

the position that the partnership has been dissolved, they believe the testimony of said Hundley, they should find for the defendant Roberts; this Court holding that the testimony of said Hundley does not show a dissolution of the partnership styled Cody, Roberts & Co.

GHOLSTON vs. GHOLSTON.

1. A party to a libel for divorce, who may be dissatisfied with the *first* verdict, has a legal right to move that the verdict be set aside, and a new trial granted.
2. Commissioners to take the depositions of witnesses, in answer to interrogatories, having been returned into Court, and opened more than one day before the cause was called for trial, a party who, upon inspection of the papers so returned endorsed upon them certain objections in writing, (for causes other than irrelevancy,) but does not call the attention of the Court to them before the cause is submitted to the jury, is not entitled to be heard upon them, when, in the progress of the cause, the depositions are offered in evidence. The objections must not only be "*taken*," but "*determined*," before the cause is submitted to the Jury. The onus is upon the party objecting, to invoke, in due time, the judgment of the Court upon his objections.
3. The charge of the Court below (incorporated into the opinion) correctly expounds the law of divorce, in such a case, upon all the points made against it in the bill of exceptions.
11. The sending with the Jury, to their room of a written charge, as delivered from the Bench, is incorrect practice.
12. The Court below commenced the final charge to the Jury before twelve o'clock on a Saturday night, and concluded it after that hour. The Jury remained in their room until after the Sabbath had passed away, and then returned their verdict: *Held* that this does not vitiate the verdict, notwithstanding there may be reason to believe that they came to an agreement on the Sabbath day, and notwithstanding the Judge caused the Jury, by consent of parties, to come into Court on the Sabbath, but upon the withdrawal of the consent by one party, remanded them before the verdict had been read.

Gholston vs. Gholston.

13. A Jury having had the case in charge for several hours, and being unable to agree, were informed by the Sheriff in whose custody they were, that "unless they should agree speedily, the Judge would take them with him to Elbert county, and that he (the Judge,) was making preparations for that purpose:" *Held*, that this was a sufficient ground for setting aside the verdict and awarding a new trial, even though the representations made by the Sheriff be untrue.

Divorce, in Madison Superior Court. Tried before Judge THOMAS, at the March Term, 1860.

Jane Gholston filed a libel in Madison Superior Court, asking a divorce from James S. Gholston, her husband, on the ground of cruel treatment, alleging: That the said James S. habitually used harsh and indecent language to, and of, the libellant; that he imposed upon her laborious domestic drudgeries, which his pecuniary means and circumstances did not justify; that he encouraged his children to treat her with disobedience and disrespect; that he taunted her with his preference for other, and younger women, and that he attempted illicit intercourse with another woman; that he shook a cow-hide over libellant, and actually threw her out of the house; that after repeated incivilities and insults, as well as a disregard of his obligations as a husband, he whipped the libellant with a cow-hide, and compelled her to seek safety and refuge elsewhere.

Appended to the libel, is a schedule of the property owned by defendant at the time of the separation, which schedule is verified by the affidavit of the libellant, in which she states: That that portion of said property owned by defendant at the time of the marriage, is worth nine thousand dollars, and that portion owned at the time by the libellant is worth ten thousand.

The defendant, in his answer, denies the allegations of the libel, and resists the application for a divorce.

Inasmuch as there is no allegation in the record that the finding of the Jury was contrary to the evidence, it is deemed unnecessary to give the evidence in this statement.

The libellant offered as evidence, the answers of various witnesses, taken by commissioners, some of which were objected to by counsel for the defendant, on the ground that one of the commissioners was the agent of the libellant, and biassed in her favor; and that the commissioners consulted

another agent of the libellant during the time the witnesses were answering the interrogatories; and that the answers were not sworn to. Others were objected to, on the ground that the the witness' name was not subscribed to the answers; and that the commissioners had not written their names inside of the package, but simply across the seals on the outside. Others were objected to on the ground: That the names of the commissioners were not inserted in the commission; and that the package was not sealed up with separate seals, but only pasted up, as envelopes usually are; and that there was no seal inside the package, and only the letters "com" written on a line below the commissioners' names.

All these objections were written on the envelopes containing the testimony, and were dated the 6th of March, 1860, whilst the trial commenced the 9th of March, 1860. None of the objections were *determined* before the case was submitted to the Jury: wherefore, the presiding Judge overruled the objections, and admitted the testimony.

The entire charge of the presiding Judge, as well as the charges which he refused to give, as requested, and the qualifications which he made to such requests, are all given in the opinion of the Court, and are therefore omitted here.

When the Court concluded the charge, it was about half hour past mid-night, Saturday night, or thirty minutes, A. M., Sunday. The Court remarked to the Jury that they could consider of their verdict then, or wait in their room till Monday morning before commencing their investigation, just as they liked. The Jury then retired and the Court took a recess.

At about three o'clock, P. M., on Sunday (same day) the Jury sent for the Judge, came down into their box, and informed him that they had agreed upon their verdict. Objection being made to the reception of the verdict at that time, the Jury were ordered back to their room, and on Monday morning following, came into Court with a verdict in favor of the plaintiff for a total divorce, five thousand dollars, and costs, which verdict was then delivered and recorded.

Whereupon, the Court adjourned until the fourth Monday in July thereafter.

During the adjourned Term of the Court, which commenced on said fourth Monday in July, the defendant, by his counsel, moved the Court to set aside said verdict, and to grant a new trial, on the following grounds, to-wit:

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1st. Because the Court erred in permitting the plaintiff to read in evidence, against objection by the defendant, the depositions of Martha and Elizabeth C. Echols, Edna Gentry, Maria Herring, Francis Woods, Henrietta Tiller, and Celia Carrington.

2d. Because the Court erred in ruling that the plaintiff had a right to introduce in evidence her own sayings, spoken at a time when, as the witness, Poss, testified in answer to defendant's question as to his having complained to plaintiff about her marriage with defendant, he told her she ought to have a marriage contract.

3d. Because the Court erred in charging the Jury, that what constitutes cruel treatment, in the meaning of the Law, is a question of Law for the Court.

4th. Because the Court erred in charging the Jury, that if a husband inflicts on the wife, by force or violence, bodily pain or suffering, and especially degrading pain or suffering such as cow-hiding or whipping, this would be cruel treatment. But this, and such as this, is not all that constitutes cruel treatment. The commission of acts which outrage the feelings of modesty and decency, such as threatening to commit, or attempting to commit, adultery, or cursing, abusing, or using insulting and opprobrious language, when done between husband and wife, whether by the husband to the wife, or by the wife to the husband, and in the knowledge, or coming to the knowledge, of both; these, also, if persisted in and unatoned for, constitute cruel treatment. Now, if you believe from the evidence, that the defendant, previous to the bringing of this suit, has been guilty of either of these kinds of cruel treatment, without sufficient justification, you ought to decree, by your verdict, either a total or conditional divorce.

5th. Because the Court erred in charging the Jury, that when a woman sues her husband for a divorce, on the ground of cow-hiding or whipping her, he cannot justify, by showing opprobrious or abusive language on her part, because it is not *like conduct* in the language of the Law.

6th. Because the Court erred in charging the Jury: You will inquire from the whole evidence, do you believe he cow-hided her? If he did, she is entitled to a divorce on that ground alone—no evidence being brought before you of like conduct to that on her part.

7th. Because the Court erred in charging the Jury, that all instances of misconduct on his (defendant's) part that you believe to be true, from the evidence, ought to be considered by you as to whether you will make the divorce, if granted, more favorable to her (plaintiff.)

8th. Because the Court erred in charging the Jury, that if they should find a partial divorce, they might give the plaintiff a portion of the property, belonging to the defendant, as her own, to do with as she pleased.

9th. Because the Court erred in refusing to charge the Jury in the language requested by the defendant, that, if they believed, from the testimony, that the defendant was guilty of any mistreatment or cruelty towards plain iff, and that after such treatment or cruelty was brought to her notice, she still voluntarily lived with him, this is evidence going to show that she consented to such treatment or waived her rights under it; and if she did consent to it, or waive her rights under it, then she cannot claim a divorce on that ground.

10th. Because the Court erred in refusing to charge the Jury, as requested, that if the libellant was consenting tacitly to the whipping defendant gave her—if he gave her any—though such consent was not known to the defendant at the time, then she is not entitled to a divorce for that cause. But the Court, after remarking to the Jury that the above was good Law, charged them, at the request of plaintiff's counsel, that there is no evidence of any consent in this case.

11th. Because the Court erred in sending out with the Jury the written charge—the whole charge being in writing—and all going out together.

12th. Because the case was partly tried upon the Sabbath day—the Court having charged the Jury, and the Jury having retired and considered and determined upon their verdict on that day.

13th. Because the Jury were improperly influenced to agree upon a verdict speedily on Sunday by representations, that unless they should agree speedily, the Judge would carry them with him to Elbert county, and that he was making preparations for that purpose.

In support of the 12th and 13th grounds of the motion, defendant's counsel presented the following affidavits:

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GEORGIA, MADISON COUNTY:

Personally appeared in the open Superior Court of said county, William H. Saye and Lorenzo D. Ferguson, who, being duly sworn, depose and say: That they served as special Jurors on the trial of the case of Jane Gholston vs. James S. Gholston—Libel for Divorce—tried at the regular March Term, 1860, of said Court, and that it was about half hour past twelve o'clock, A. M., Sunday, when the Judge concluded his charge, and the Jury retired to consider of their verdict, that said verdict was considered of, determined upon, written out, and signed on Sunday; that previous to their determination upon said verdict, the Jury were informed by the officers having them in charge, that unless they should make up their verdict speedily, they would be carried out of the county and kept upon the Jury until they should agree; that the Judge had so said, and had engaged a conveyance for that purpose; and that said verdict having been so made up and signed, the Jury came into Court about three o'clock, P. M., on Sunday, to deliver the same, but that objection being made to the reception of the verdict at the time, it was written over and delivered into Court after twelve o'clock, A. M., on Monday.

W. H. SAYE,

L. D. FERGUSON.

Sworn to and subscribed in open Court, 24th July, 1860.

J. M. SKINNER, CLERK.

GEORGIA, MADISON COUNTY:

In the open Superior Court of said county, personally appeared William T. Moon, who, being duly sworn, says, on oath, that he was Sheriff of Madison county at the regular March Term, 1860, of said Court, and as such, attended the Jury engaged in the trial of the Divorce case between Jane Gholston, libellant, and James S. Gholston, defendant, and that having understood from the Judge and others that the Jury would be carried to Elbert county unless they should speedily agree upon a verdict, he (deponent) communicated this information to the Jury on Sunday, and was informed by them that they had not then agreed upon a verdict, and that in a few hours thereafter, to-wit: about three o'clock, P. M., on that day the Jury informed the Court that they had agreed upon a verdict, and came out of their room to deliver it.

WM. T. MOON, Sheriff.

Sworn to and subscribed in open Court, 24th July, 1860.

Test: J. M. SKINNER, Clerk.

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The Court held up the decision of the motion for a new trial until the September Term, 1860, of the Court, at which time he rendered his decision, overruling the motion, and refusing the new trial. As to the second ground taken in said motion, the Judge certifies this to be the state of facts, to wit: Wm. L. Poss had been introduced by plaintiff. On cross-examination, he said: Plaintiff is my mother; her general character is not that of a very disagreeable person to live with; after her marriage with defendant, I don't know that I complained of her, but I told her she ought to have had a marriage contract; plaintiff offered to prove by the witness the balance of the conversation with his mother, which the Court decided he could do after objection made by defendant's counsel; defendant's counsel then moved to withdraw the question and answer as their evidence, which was objected to by plaintiff's counsel; the Court allowed the question and answer to be withdrawn, and then being withdrawn, the Court refused to allow plaintiffs' counsel to ask about the balance of the conversation; counsel moving for this new trial must have failed to read over these notes, which were filed in the Clerk's office and subject to their inspection for more than four months.

The refusal of the presiding Judge to grant a new trial is the error complained of.

T. M. DANIEL, for the plaintiff in error.

HESTER & AKERMAN, for defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

This was a libel for divorce, filed by Jane Gholston, against James S. Gholston, for a divorce, a *vinculo matrimonii*, upon the ground of cruel treatment. At the March Term, 1860, of the Superior Court of Madison county, the cause came on for trial, and a verdict was returned granting a total divorce between the parties, and providing for division of the property between them.

A motion for a new trial was made by counsel for defendant, on sundry grounds, which will hereafter be considered. After argument, the Court below refused the rule absolute for a new trial, and plaintiff's counsel excepted, insisting on

each ground taken, and assigning error upon the ruling of the Court on each.

1. In the Court below, a preliminary question was raised by the respondent to the rule *nisi*, upon which she moved to dismiss the rule, viz: "That the defendant cannot move for a new trial after the first verdict, and before the second, in a case where a total divorce is granted—the verdict, in such case, not being final as to him, and the Law itself giving the appeal, without its being demanded by the defendant." The Court overruled the motion of respondent, and it is renewed here.

It is erroneous to say that the Law gives the defendant, in a libel for divorce, an appeal, as a matter of course. An appeal annuls the verdict from which it is taken, unless the appeal be dismissed by consent, or on motion for irregularity, the verdict goes for nought—accomplishes nothing. But the Constitution provides, that "divorces shall be final and conclusive, when the parties shall have obtained the concurrent verdicts of two special Juries, authorising," &c. The first is as necessary to effectuate the divorce as the second. If there be any irregularity in the obtainment of the first, it is as important to the defendant that it be corrected, as a like irregularity in the second. The obtainment of the first verdict is an advance made, a position gained by the libellant: it is half the work accomplished. If illegally rendered, it ought to be set aside; but this can only be done by a motion made during the Term at which the verdict was rendered. We hold that the Court committed no error in overruling the motion to dismiss the rule *nisi*.

2. Certain depositions of witnesses, taken under commission, in answer to interrogatories attached, and when the plaintiff proposed to read them in the progress of the trial, defendant objected, for reasons other than the irrelevancy of the evidence. Plaintiff replied, that the commissions had been in Court, opened, and subject to inspection more than one day before the commencement of the trial, and that all objections then urged were bad in Law, unless "taken and determined before the case was submitted to the Jury."

Defendant rejoined, that the objections had been written out upon the envelopes to the commissions severally, before the cause was submitted to the Jury, and must have been seen by plaintiff or her counsel.

The Court held that, in the language of the Law, the objections must be "taken, *and determined* before," &c., and that the onus was upon the party objecting, not only to "take," but to ask a *determination* of the objections before going to the Jury. We hold this ruling correct.

The exception taken to the overruling of the second ground in the motion for a new trial, is divested of all force by the explanation of the Court below appearing in the record, and therefore will not be considered.

3. The 3d, 4th, 5th, 6th, 7th and 8th grounds taken in the motion for a new trial allege errors in the charge given by the Court, as the exceptions cover nearly the whole of it.

We overrule all the exceptions from the 3d to the 8th inclusive, holding, that, on all the points therein made, the Court gave the Law in charge to the Jury.

"GENTLEMEN OF THE JURY:

"We have arrived at the end of the investigation of this case, which has been necessarily long, tedious and complicated. During the whole of it, I have endeavored, to the best of my ability, to hold the scales of justice evenly between the parties, and to give to each the amplest opportunity to lay their respective cases before you in the manner most satisfactory to themselves. Whether I have done this or not, is subject to review by a higher tribunal. No mistake of mine can by any possibility injure either of these parties. The evidence and the points decided all exist in writing; and this charge is put in writing in order that either party must have a correct statement of his grievance, if he chooses to appeal to that tribunal. And this reminds me to state to you right here, that while you alone can judge of the facts—while you alone can say what is true or what is false, you are bound by Law to take the Law from the Court; you are bound not to disregard the Law as given you in charge by the Court, but you ought honestly and independently to enforce it according to the evidence. The reason and plain necessity for this obligation on your part will be seen at once, when I remind you that while it is true that no mistake of mine can injure the parties, because my judgments can be revised and corrected, it is equally true that the parties have no remedy against any mistake of yours in matters of Law. No writ of error or bill of exceptions lies against you to the Supreme Court. If you, therefore, refuse to take the Law

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from the Court, the injury to the parties may be totally without remedy. Our system of jurisprudence, therefore, ordains and establishes—and wisely ordains and establishes—that the Jury taking the Law in confidence and good faith from the Court, shall limit themselves scrupulously to their appropriate functions, which are fully discharged where they find the truth of the facts, and honestly apply the Law given in charge by the Court to those facts.

“This is a suit for a divorce, brought by a woman against her husband, a full statement of the grounds for which is contained in the declaration read to you by the plaintiff’s counsel. All these grounds, it is contended by the plaintiff, constitute what the Law calls by the general name of cruel treatment. The divorce is not sought on any other grounds—none other is taken in the libel filed. Now, what constitutes cruel treatment, in the meaning of the Law, is a question of Law for the Court. If the husband inflicts on the wife, by force or violence, bodily pain or suffering, and especially degrading pain or suffering, such as cow-hiding or whipping, this would be cruel treatment. But this, and such as this, is not all that constitutes cruel treatment. The commission of acts which outrage the feelings of modesty and decency, such as threatening to commit, or attempting to commit, adultery, or cursing, abusing, or using insulting and opprobrious language, when done between husband and wife, whether by the husband to the wife, or by the wife to the husband, and in the knowledge, or coming to the knowledge, of both—these, also, if persisted in, and unatoned for, constitute cruel treatment. Now, if you believe, from the evidence, that the defendant, previous to the beginning of this suit, has been guilty of these or either of these kinds of cruel treatment, without sufficient justification, you ought to decree, by your verdict, either a total or conditional divorce; and whether you allow a total or conditional divorce, is a question exclusively for you to decide, from the evidence, and the evidence alone; for the Law says, “in case of cruel treatment on the part of one toward the other of the parties, the Jury may, according to the circumstances of such case, determine whether the divorce shall be from the bonds of matrimony, or from bed and board;” the first part of which means a total divorce, and the last means a conditional or partial divorce. Evidence has been offered and admitted before you, tending to show

these several sorts of cruel treatment; but whether you believe the evidence or the charges to be true, from the evidence, is a question exclusively for you. It is your duty to examine well the evidence, and all the evidence on both sides, and let your verdict show what are your honest convictions on these points after having so examined it.

"On the trial of a defendant for an assault, or assault and battery, opprobrious words or abusive language, may amount to justification: and if the defendant were, on trial for whipping his wife, the question would arise, whether this provision of the Law applied to the case of a man whipping his wife? But such a question does not arise in this case. When a woman sues her husband for divorce on the ground of cow-hiding or whipping her, he cannot justify himself by showing opprobrious or abusive language on her part, because it is not *like conduct*, in the language of the Law. Abusive or insulting language by a woman to her husband is not *like conduct* with cow-hiding or whipping the wife by the husband. But opprobrious and abusive language, when used by the wife to the husband, outrages the feelings of modesty and decency as much as when used by the husband to the wife. Now, do you believe, from the evidence, she did this, or was guilty of conduct similar? If she did, she is not entitled to a divorce, either total or partial, on the ground of his cursing or abusing her, or threatening or attempting to commit adultery; for it would all be *like conduct*, as the Law terms it, both tending alike to hurt and wound the feelings.

"Now, therefore, you will inquire, did he outrage her feelings as she complains? Next, did she outrage his as he complains? Is he guilty, and she not guilty, in this respect? If so, she ought to have a Divorce. Are they both guilty, or she more guilty than he in the matter of insulting and wounding each other's feelings? If so, you ought not to grant a divorce.

"Now, passing from this, you will inquire from the whole evidence, do you believe he cow-hided her? If he did, she is entitled to a divorce on that ground alone, no evidence being brought before you of like conduct to that on her part. Though I have charged you that abusing and insulting him is not like conduct with cow-hiding her, and cannot be considered by you as a ground for refusing a divorce, if you believe he cow-hided her; yet, it may, and, if true, ought to

be considered as one of the circumstances of the case to determine whether the divorce shall be from the bonds of matrimony, or from the bed and board, and all other instances of misconduct on her part that you believe to be true, from the evidence, ought to be considered as to whether you will make the divorce, if granted, less favorable to her, and all instances of misconduct on his part that you believe to be true, from the evidence, ought to be considered by you as to whether you will make the divorce, if granted, more favorable to her.

“With regard to the contrary and conflicting evidence introduced here, if you believe it to be contrary and conflicting, you must weigh it all, and the circumstances surrounding it, and decide according to the preponderance of evidence. This being a civil case, you are to decide according to the preponderance of evidence, and need not believe, beyond a reasonable doubt, any fact in order to find it true.

“You must also bear in mind the difference between positive and negative evidence. When a witness says he saw a thing, that is positive evidence; when a witness says he did not see a thing, that is negative evidence. Now, when both witnesses are equally credible, and otherwise equally reliable, the positive evidence ought to prevail over the negative, and especially when the witness who testified negatively, not only that he did not see the thing, but also that he did not look for it.

“The defendant’s answer has been read before you, and you have heard his statements on his side of the case. To put in this answer and to read it to you was his clear right, for the Law says: The defendant’s answer or defensive allegation in writing may extenuate, deny or contain as much matter, or as many circumstances in his defence, as he may think necessary and proper therein. But you must remember, this answer is not evidence, and must not be regarded by you only so far as it is sustained and proved by the evidence. You must look to the evidence, and the evidence alone, to decide how far you will find the answer true.

“With regard to the manner in which you will dispose of the property contained in the plaintiff’s schedule, you will first inquire how far that schedule is sustained by the evidence? Did the defendant own the property contained in the schedule? Does he own it now? What is it worth? How much of it did he get by his marriage with the plaintiff?

Having ascertained these points, if you conclude to grant a total divorce, you will further find from all the surrounding circumstances established by the evidence, how much of it will you give to the plaintiff, if any? How much of it will you give to the defendant, if any? How will you divide it? All this you must find and decide by your verdict. The Law leaves it to your discretion, and you must be controlled in your decision only by the evidence, and by the rules of Justice, Equity and good conscience.

"If you find and decree a conditional and partial divorce, you will still have to decide what separate maintenance and support you will allow to the wife. In this case—that is to say, in case of a conditional or partial divorce, the Law says, the Jury, by their verdict or decree, shall make provision out of the property of which the husband may be possessed for such maintenance and support. The manner in which you shall do this, the Law leaves entirely at your discretion. You may do this by giving her a portion of the property as her own, to do with as she pleases, you may do it by giving a portion to support her during life, or you may do it by decreeing that the defendant shall pay to some officer, as the Clerk of the Court, or to some trustee to be appointed, a monthly, or quarterly, or annual allowance in money for such support or maintenance."

9. The 9th ground of the motion alleges error in that the Court refused to charge the Jury as requested. This was the charge requested, viz: "That if the Jury believed, from the testimony, that the defendant was guilty of any mistreatment or cruelty towards the plaintiff, and that after such treatment or cruelty, was brought to her notice, she still voluntarily lived with him, this was evidence going to show that he consented to such treatment, or waived her rights under it; and if she did consent to it, or waive her rights under it, then she cannot claim a divorce on that ground." It appears from the record, that this charge was given to the Jury by the Court, except that His Honor declined to say, that a wife living with her husband after ill-treatment received from him, is evidence that she consents to such ill-treatment, and we think he very properly excepted from his charge that portion of the request.

10. The 10th ground of the motion assigns error in this: that the Court, after having charged the Jury as requested

by defendant's counsel, "that if the libellant was consenting tacitly to the whipping defendant gave her, (if he gave her any,) though such consent was not known to the defendant at the time, then she is not entitled to a divorce for that cause," added at the request of plaintiff's counsel, "there is no evidence of any consent in this case."

We think it better that Judges, in charging Juries, should abstain from saying to them, that there is, or is not, evidence in the case of this or that fact. But seeing nothing in this case proving directly, or raising the presumption of such consent, we would not, for that cause, send this case back.

11. The error complained of in the 11th ground, consists in the sending out of the written charge, as delivered to the Jury. This we think an unsafe practice. The precautionary injunction to the Jury not to read any part without reading the whole, is not a reliable safeguard against even an unintentional misuse of the document. Books from which the Law is sometimes read to a Jury by the Court, are not allowed to go to the Jury, and yet, they might be sent, with the portion read, plainly marked, and an injunction that if they opened the book, they must read all that was so marked, and no more.

12. The 12th ground is, "that the case was partly tried upon the Sabbath day, the Court having charged the Jury, and the Jury having retired and considered, and determined upon their verdict on that day." These appear to be the facts arising here. The Court was actually delivering the charge to the Jury on Saturday night, when the hour of 12 o'clock arrived, and the Sabbath day, according to our computation of time, had commenced before he concluded. This may have been inadvertence, but, under all the circumstances, was certainly no very grave error. On the Monday following, the same Judge was, by Law, required to open and hold a Court in another county. Beyond the conclusion of the charge, and the sending of the Jury to their room, nothing was actually done in open Court on the Sabbath day. The Jury could not legally be discharged until Monday morning, and must therefore of necessity be sent to their room. In the course of the Sabbath day, perhaps about three o'clock, P. M., the Judge received a message from the Jury, that they had agreed upon their verdict, and the counsel of each party in the case being present, or having been summoned, con-

sent to its reception by the Court. The Judge then went into the Court-room, and sent for the Jury. Upon their entrance, and before the verdict was read, one of the counsel in attendance retracted the consent he had given, that the verdict be received, and objected to it. The Jury were then remanded, and their verdict was not received until Monday morning. Whatever judicial action was had in the case on the Sabbath day, was either inadvertent or inevitable. Of the latter character was the retention of the Jury in their room. That being unavoidable, it is inconceivable how they could have been restrained from thinking and speaking of the case. We think what transpired on the Sabbath was not sufficient to vitiate the verdict; holding, at the same time, that all Courts should abstain from the transaction of ordinary business on that holy day.

13. The 18th, and last ground upon which the motion for a new trial was based, is, "That the Jury were improperly influenced to agree upon a verdict, by representations that unless they should agree speedily, the Judge would carry them with him to Elbert county, and that he was making reparations for that purpose." This communication was made to them by the Sheriff of the county, under whose official charge they had been placed.

This conduct of the Sheriff was a gross and flagrant violation of his official duty. And, moreover, it cannot be lightly regarded, in considering the validity of the verdict. It is an inflexible rule of Law, that after a Jury shall have been charged with a cause, having had the Law and the evidence read before them, by or under the supervision and direction of the Court, all communication between them and the rest of mankind shall be suspended, except by permission of the Court, until they shall have been discharged from the case. It is of the last importance that this rule be rigidly enforced, to the end that the administration of justice may be both pure and free from the suspicion of impurity. The ascertainment that some unauthorized communication had been had with the Jury, the nature and purport of which was unknown, ought to vitiate a verdict. How much more a known communication, calculated to intimidate Jurors, to unsettle their resolution, based upon fixed and well considered opinion—to produce a conflict between a sense of duty and personal comfort, convenience or interest. Here were men withdrawn

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from their families and their occupations, for the discharge of a public duty, with the confident expectation of being restored to their usual associations and employments at the close of the week. Being required to render a verdict in a cause submitted to them with unanimity, and being unable to agree in opinion, until that week had been spent and another had commenced, whilst in this state, (for such is the evidence,) the above communication is made to them by the ministerial officer of the Court, who professes that he "*understood (it) from the Judge and others.*" It matters not that the communication was untrue. Dare we assume that the Jury received it as untrue? Dare we speculate upon the probable influence it exerted? They were threatened by an officer of the Court, (for that is the nature of the communication,) who, in aid of the threat, proposes to have for it the high sanction of the Judge, with being thus carried away from their homes, their county and their business, and confined for an indefinite period in another county, unless they speedily agree upon a verdict. There are many men who would be more easily moved from an opinion or a purpose, by such a threat, than by the offer of a pecuniary bribe. We cannot be assured that the agreement, subsequently made, but unattainable before, was not effected by this communication. The communication itself was clearly illegal; it was calculated to influence the Jury, or some of them, and therefore the verdict is not free from taint. We are reluctantly constrained, for this reason, to reverse the Judgment of the Court below, refusing a motion to set aside the verdict and grant a new trial.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be reversed, on the ground that there was an improper and illegal interference with the deliberations of the Jury, after the Court had charged them in the case, by unauthorized communication with them of the Sheriff of the county, and that the Court erred in not setting aside the verdict upon the thirteenth and last ground of defendant's motion for a new trial.

BLACK *et al.* vs. THORNTON.

1. If a voluntary deed for slaves be signed, sealed and attested, but not then delivered by the donor to the donee, or to any other person for him, and if, before the delivery of such deed, a third person purchase said property from the Sheriff who had levied on it as the property of the donor, advertised and exposed it legally to public sale, or from the grantor for a valuable consideration, such purchaser acquires a legal title to the slaves, as against the volunteers to whom the deed was delivered after such purchase, whether the purchaser had notice of such previous signing, sealing and attestation of the voluntary deed or not. And if there be doubt as to the time of the delivery, it is the province of the jury to determine whether it occurred before or after the sale for value.
2. It is not error in the Court, after having charged the jury as to a presumption arising under a given state of facts, not amounting to positive proof of the thing presumed, to add "but this presumption is not conclusive. It may be rebutted by evidence, and it is for you to determine, whether or not it has been rebutted."
3. A mere rumor or vague report brought to the knowledge of a purchaser for valuable consideration, at or before the purchase, that there was an outstanding claim, or conveyance, or by, or to, whom made, is not such notice as will vitiate his title in favor of a volunteer.
4. It is not error in the Court to charge the Jury "that if they believe one of the witnesses sworn was called on by the parties at the time of the transaction, to bear witness to it, or was deliberately consulted by them, such circumstances are to be considered by the Jury in favor of giving special weight to his evidence; but such circumstances are not conclusive, they may be overborne in the minds of the Jury by others."
5. A party claiming title to property by deed of gift, is denominated a volunteer, and a subsequent purchaser for a valuable consideration, without notice of the voluntary conveyance, is preferred in law to the volunteer; but if he had notice before he purchased, the volunteer will be preferred over him.
7. In polling a Jury, the better course is to begin with a distinct reading of the verdict returned, calling their attention to it, and then (calling them *seriatim* by name,) to propound to each the question, "what say you, Mr. Juror, is this your verdict, or is it not?" But where there is a genuine verdict for the defendant, the question, "Mr. Juror, do you find for the plaintiff, or for the defendant?" is equivalent, and the polling legal.
8. The Jury being polled in this form, each Juror answered, that he found for the defendant, but some four or five added, each for himself, to the response, that "he was not satisfied," or "not fully satisfied," or said "he was not fully satisfied, but with the lights before him, found for the defendant." *Held*, 1st. That freedom from doubt, especially where the finding was for the defendant, is not required. 2d. That a verdict so rendered, is unanimous and legal.

Black et al. vs. Thornton.

3. *Held*, that under the circumstances of this case, a conversation between the donor and defendant in execution; his son who was the father of the donees, in the voluntary conveyance, (under age at its date,) and who took himself, a usufruct in the property by the terms of the deed; the purchaser at sheriff's sale, and a person, specially selected as adviser or witness, occurring before the sale, by the sheriff, and referring to matters now in issue, was properly received in evidence, and considered by the Jury in determining the question of notice of the prior conveyance, affecting the purchaser.

Trover, in Elbert Superior Court. Tried before His Honor, Judge THOMAS, at the September Term, 1860.

Lemuel Black and his wife Priscilla H. Black, formerly Priscilla H. Thornton, and Willis Scroggins and his wife Martha E. Scroggins, formerly Martha E. Thornton, instituted an action of Trover against William T. Thornton, to recover damages for the alleged conversion of the following negro slaves, to-wit: Sina, nineteen years of age, and her two children, one about two years of age and the other an infant; Jacob, about fifteen years of age; Seaborn, thirteen years of age; Robin, eleven years of age; Louisiana, nine years of age; Benaja, seven years of age; and Henry, *alias* Bose, eighteen years of age; which negroes the plaintiffs allege are their property, and are of the aggregate value of fifty-one hundred dollars.

The defendant, by his plea, denied the title of the plaintiffs, and also alleged that their right of action (if any) was barred by the Statute of Limitations.

On the trial of the case in the Court below, the following evidence was adduced:

Evidence for the Plaintiffs.

An original deed of gift of which the following is a copy, to-wit:

“GEORGIA, ELBERT COUNTY:

“Know all men by these presents, that I, Daniel Thornton, of the State and County aforesaid, do for the good will and affection that I have for my grand-daughters, Martha E. Thornton, and Priscilla H. Thornton, (daughters of William D. Thornton,) give to them a certain negro woman named Ann, and her child Sina, and their increase; the said negroes to be

used by the said William D. Thornton and his wife for their benefit, until the said Martha E., and Priscilla H. Thornton become of age.

"In testimony whereof, I have hereunto set my hand and affixed my seal, this 17th day of November, 1838.

"Signed in the presence of ELIJAH JONES and IBRA H. CLEVELAND.

his
"DANIEL ~~X~~ THORNTON."
mark

Ibra H. Cleveland testified : That said deed of gift was signed in his presence, and attested by himself and Elijah Jones as witnesses ; that there was no one present but the witnesses to the deed and the maker ; that he saw no delivery of the deed ; but afterwards and before the death of the maker, he saw the deed in the hands of Sarah Thornton, the mother of Martha E., and Priscilla H. Thornton ; that the deed was written by Joseph Blackwell as the maker said, and that it was signed on the day it bears date ; that the witness is the uncle of the female plaintiffs ; that after the death of Daniel Thornton, and in the lifetime of Sarah Thornton, Reuben Thornton told witness, that he was willing for the children, Martha E., and Priscilla H., to have the negroes if they belonged to them.

Thomas J. Heard testified : That Sarah Thornton, wife of William D. Thornton, and mother of the female plaintiffs, handed him the deed of gift, in July, 1845, to give to the Clerk, Mr. Christian, to be recorded, which witness did ; that witness did not take the deed from the office, and did not see it again until a former trial of this case ; that William D. Thornton by reputation is dead, and probably died before the commencement of this suit.

Jacob M. Cleveland testified : That the negro woman Ann was born the property of witness' father ; that on the first Tuesday in January, 1829, the witness, as administrator of his father's estate, sold Ann at administrator's sale ; that at the sale Sarah Thornton, wife of William D. Thornton, who was then unmarried, bought said negro woman Ann ; after the inter-marriage of Sarah and William D. Thornton, he owned the negro for six or seven years, and mortgaged her to William A. Beck, or Beck & Clark ; she was sold under the mortgage on the 25th of December, 1836, and bought by Beck,

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who shortly thereafter, sold her to Daniel Thornton ; after old Daniel Thornton bought the negro, the witness saw her, and the negro Sina in possession of William D. Thornton ; that Sina was born in the possession of William D. Thornton, and the negroes remained in his possession from 1836, or January, 1837, until they were sold by the Sheriff, during all of which time, William D. Thornton lived on land of his father's and cropped with him ; old man Thornton had several negroes, whilst William D. had none in his possession but Ann and Sina ; Martha E. Thornton was born in 1831, and Priscilla was born about the last of the year, 1834, or the first of 1835 ; Lemuel Black and Priscilla H. Thornton inter-married in the latter part of 1837, or the first of 1838, and before the commencement of this suit.

John Adams testified : That he knew the negroes Ann and Sina in the possession of Reuben Thornton ; Ann was Sina's mother ; he also knew Jacob, and Seaborn, and Bose, all of whom were Ann's children ; having heard some talk of the deed of gift to the female plaintiffs for the negroes, the witness raised a conversation with Reuben Thornton on the subject, some time in the year 1852, whilst the witness was over-seeing for him ; in the conversation Reuben Thornton told the witness that there was such a deed of gift, and that he knew it before he bought the negroes ; witness then said, if that was the case the children, (meaning the female plaintiffs,) would gain the negroes, to which Reuben Thornton replied, not in his life-time ; the witness lived with Reuben Thornton three years, to-wit : in 1844, 1845, and again in 1851 or 1852 ; the witness did not swear on the former trial of this case, that the conversation with Reuben Thornton occurred in 1847, or 1848, or 1849 ; nothing else of importance occurred in the conversation about the deed of gift ; Reuben Thornton did not say that the negroes would be his as long as he lived, and when he was dead and gone he did not care much about it ; no such expression was used ; he did not tell witness how, or when, or from whom, he obtained a knowledge of the existence of the deed of gift, except that he knew it before he bought the negroes ; it has been seven or eight years since the hearing of the witness became bad like it is now ; it first began to fail when he was ten years old, resulting from a rising in his ear ; he is now sixty years old ; his hearing was so that he could understand common conver-

sation last Spring, and ten years ago, and twenty years ago, and thirty years ago; he could hear common conversation when he had the talk about the deed of gift with Reuben Thornton; he does not know that he swore on the former trial, that his hearing became bad twenty years ago for the first time; witness and Reuben parted like brothers, and were perfectly friendly; there never was any difficulty between them; witness once sued him in Elbert Superior Court about his wages as overseer, the first time he served him as such, and had the cost to pay; he does not recollect the date of the suit.

Thomas J. Adams testified: That he knew the negro woman Ann in Reuben Thornton's possession, together with her children Sina, Jacob, Robin, Scaborn, Louanna and Bose, who was called by another name not recollected by witness; Sina had two children, one of which could walk, and the other was a sucking infant when he lived with William T. Thornton; witness never saw any of the negroes in possession of Wm. T. Thornton, except Sina and her children; witness lived with Reuben Thornton in the year 1852 or 1853; in the latter part of the year, witness told him that he had heard Mrs. Thornton, wife of William D. Thornton, say, that she had a deed of gift for these negroes, and he asked Reuben Thornton if it was so, to which he replied, that he knew there was such a deed, and that he knew it before he bought the negroes; witness' reason for asking Reuben Thornton about the deed was, that he heard Mrs. Thornton say, she had such a deed; this is the reason given on a former trial; witness was hauling and ginning cotton at the time, and does not think he swore on a former trial that he was hauling corn; Scroggins' name was not mentioned in the conversation, and witness does not recollect giving as a reason for asking Reuben Thornton about the deed, that he had heard that Scroggins was about coming up to assert his claim; Reuben Thornton said he knew of the deed before he bought the negroes, but that it would not pester him in his life-time, and when he was dead it would not pester him; witness is the son of John Adams, the other witness.

Plaintiffs then proved the value of the negroes and their hire.

The marriage of Martha E. Thornton and William Scroggins was admitted by counsel for defendant.

The will of Reuben Thornton was read in evidence, from

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which it appeared that Ben, a negro, son of Ann, was willed to Benjamin Thornton, a brother of Reuben Thornton, and that Henry, *alias* Bose, was bequeathed to Mrs. Thornton, widow of testator.

It was admitted that by some arrangement the defendant William T. Thornton, took Henry.

Evidence for Defendant.

An original bill of sale duly proved from Daniel Thornton, to Reuben Thornton, for the negroes Ann, Sina and Henry, dated 27th of April, 1841.

An original fi. fa. issued from Elbert Superior Court in favor of William B. Davis and John C. Douglass, against William D. Thornton, Daniel Thornton and James Clark, dated October 1st, 1840, and founded on a judgment obtained the 25th of September, 1840.

On the fi. fa. was a levy on the negro Ann and Henry, as the property of Daniel Thornton, pointed out by him, and dated the 10th of December, 1840.

A copy of the "News and Planter's Gazette," a newspaper published in Washington, Wilkes County, Georgia, dated the 1st of January, 1841, showing an advertisement of said negroes, Ann and Henry, for sale by the Sheriff of Elbert County, under the levy and fi. fa. aforesaid, on the first Tuesday in February, 1841.

There was an entry on the fi. fa., showing that the property was sold pursuant to the levy to Reuben Thornton for four hundred and twenty dollars. The entry was dated 17th of March, 1841. The entry and the levy were both signed by William H. Adams, Sheriff. The fi. fa. also showed a receipt of the plaintiff's Attorney for \$2 99 $\frac{1}{2}$, and the tax and jury fee, and also of the Clerk for his cost.

An original bill of sale from William H. Adams, Sheriff, to Reuben Thornton, in which the fi. fa., levy, advertisement and sale aforesaid, were all recited, and the negroes conveyed to Reuben Thornton, the purchaser.

William H. Adams testified : That he was Sheriff of Elbert County at the time of the levy and sale, and that all the proceedings shown by the fi. fa., levy, advertisement and bill of sale, occurred as shown by the papers ; that he speaks from the papers and not from his memory, but is satisfied

that the facts and proceedings occurred, because it was his invariable custom whilst Sheriff, to see that all his papers and entries exhibited the truth.

Plaintiff's counsel moved to rule out this testimony of William H. Adams, on the ground, that although he seemed satisfied that the facts existed as he testified, yet his assurance of their truth was bottomed on the papers alone, as he had no recollection on the subject at all.

The objection and motion were overruled.

Jeremiah S. Warner testified: That he recollected the sale by Sheriff Adams of a negro woman as the property of Daniel Thornton, but could not locate the time; if he had spoken from memory, he would not have placed the time so far back as the papers showed it; on the day of, and previous to the sale of the negroes by the Sheriff, Reuben Thornton called on witness to hear a conversation between him and Daniel Thornton, and William D. Thornton, in which Reuben stated that it was rumored, that old man Daniel Thornton, had given the negroes levied on, to William D. Thornton's children, and if that was true, he would have nothing to do with the purchase; that if there was to be any after-clap, he wanted nothing to do with the property; that if the property was sound, good property, he was willing to buy it, otherwise he would not. To this Daniel Thornton and William D. Thornton both replied, that there was nothing of any such gift; the old man said, he had intended to give the negroes to William D., or William D.'s children, but that he could not do so; that William D. had ruined him, and caused him to pay out more money than the property amounted to; witness remarked, that if there had been a conveyance by will, it could be revoked, if by deed, it could not be revoked; in answer to which, all protested that there was no conveyance, and insisted on Reuben's buying the negroes, as he had part of the family, and they preferred that he should own them, rather than any one out of the family; this conversation was but a little while before the negroes were put up to sell; the witness does not recollect when old man Daniel Thornton died; his wife outlived him, and was named Sarah, as was also William D.'s wife.

The plaintiff's counsel objected to all that part of Warner's testimony relating to the sayings of Reuben, Daniel and William D. Thornton, and the witness.

The objection was overruled, and the testimony admitted.

The testimony of John Adams and Thomas J. Adams, as taken down by the Court on a former trial was read, for the purpose of showing, as it did, that there was a conflict between their testimony, given on a former trial of this case, and that given on the last trial, especially as to dates of conversations, identity of expressions, &c., &c.

The defendant then read in evidence the record of a case in Elbert Superior Court, in which John Adams was plaintiff, and Reuben Thornton was defendant, commenced 19th of October, 1847, and judgment against the plaintiff for \$36 56 $\frac{1}{4}$ cost, dated 26th of September, 1848. The only cause of action alleged in said case was, that the plaintiff Adams had given to the said Reuben his note for forty dollars, to indemnify said Reuben for going security for the son of said Adams to one Norman, and that Adams had paid said note to said Reuben, when in fact his said son had paid said Norman.

Evidence for Plaintiffs in rebuttal.

The original writ, note and judgment, from which the execution under which Ann and Henry were sold, issued, from which it appeared, that the note sued on was dated the 19th of December, 1838, and the judgment, dated the 25th of September, 1840.

The Will of the old man Daniel Thornton, bequeathing to his wife Sarah, the land on which he then lived, during her life or widowhood, then to William D. Thornton, as trustee for his children, to be divided at his death. All the remainder of his property was bequeathed to his wife for life or during widowhood; then to be divided into equal shares; one to be held by said William D., as trustee for his children, to be equally divided amongst them at his death; the other share to be held by William Bell, as trustee for his wife during her life-time, and then to her children equally.

It was admitted that old man Daniel Thornton died in 1847; that his wife survived him several years, and that she then had the land, and four or five negroes, household and kitchen furniture, &c., which came from her husband's estate.

The defendant then introduced the inventory of old man

Thornton's estate, showing that his personal estate was appraised on the 24th of April, 1846, at the aggregate sum of \$3 909 22, including in the appraisement nine negroes.

The evidence being closed on both sides, the presiding Judge charged the Jury as follows :

"The plaintiffs Black and his wife, and Scroggins and his wife, claim the negroes in controversy, under a deed of gift alleged to have been made by Daniel Thornton on the 17th of November, 1838. The first point of inquiry is, did Daniel Thornton own the slaves Ann and her child Sina, at the date of the deed? If he did, he had a right to convey the slaves and their increase by deed of gift. The next point is, are Priscilla H. Black and Martha E. Scoggins, the Priscilla H. Thornton and Martha E. Thornton mentioned in the deed? If so, they and their husbands are entitled to assert in a Court of Justice whatever right the said females have under the deed of gift. The foundation of the plaintiffs' case, is the deed of gift, which has been admitted in evidence for your consideration. Is that deed genuine, and was it made by Daniel Thornton, as it purports to be, and at the date thereof? If so, its effect in Law is to convey such an estate to the two daughters, as they cannot take, or sue for, until both of them become of the lawful age of twenty-one years; I therefore, further charge you as matter of Law, arising from this paper, purporting to be a deed of gift, that the Statute of Limitations would not run against either of the daughters, until both of them are of the lawful age of twenty-one years. Therefore, if you believe that this action was brought within four years after the younger daughter became of age, neither of the daughters are barred of their rights by lapse of time. The next point to be considered is, does the defendant hold the negroes in controversy under his father's Will, and did he, the defendant, convert them to his own use at any time within four years before the bringing of this suit? If the defendant sold the negroes, or if he worked them and used them as his own, this would be evidence of a conversion of them to his own use. If he worked the negro Sina as his own, and her children were in his possession, that would be evidence of a conversion of her and her children also, and these evidences of conversion would be sufficient in law, if there was no other evidence to controvert it. Now, does the evidence show all these points to exist in favor of the plaintiff according to the

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Law as already stated to you by the Court? If so, you ought to find for the plaintiffs the value of the slaves, with reasonable hire, according to the evidence, for the time the defendant has had the slaves in his possession, and since he sold them, if you believe he sold them, unless he has shown some lawful grounds to defeat the plaintiffs claim, and of this, that is, whether the defendant has shown any such lawful grounds, you will next inquire. The defendant contends, that the deed of gift, if it ever existed, was not delivered to the parties to whom it conveyed the property, or to either of them, until after it was sold by the Sheriff as the property of Daniel Thornton, and until after Daniel Thornton had conveyed it to Reuben Thornton. The law on this point is, that a deed of gift is of no effect or validity until it is delivered, either to the parties in interest, or to some one of them, or to some one else for them. It conveys property or rights only from the time of its delivery, and not from the time of its date: Therefore, if you believe from the evidence, that the sale was made by Sheriff Adams, or by Daniel Thornton to Reuben Thornton, or by either of them, and that such sale was made before the deed was delivered by the maker, Daniel Thornton, to the parties in interest, or some one of them, or to some one else for them, then the plaintiffs cannot recover in this case, whether Reuben Thornton had notice of the deed or not. But the truth of this, as well as of every other fact in the case, is a matter for your consideration. The simple fact that the word delivery is not used in the deed, does not invalidate it. You must decide from the evidence whether it was delivered or not. The fact that it comes here into Court in the possession of a party interested under it, is evidence that it was delivered. It is important, however, to decide in this case, whether the deed was delivered before or after the alleged Sheriff's sale. Now, the Jury must get at that fact by the circumstances in the case which bear on that point. What was the purpose of the deed? How far apart did the donor and donees live? When was it first found in the possession of any party interested under it? Look to these and all other circumstances in evidence going to show an early or a late delivery. If the voluntary deed from Daniel Thornton, and on which the title of the plaintiffs occurred, was found in the custody of Sarah Thornton, wife of William D. Thornton, who took an interest under the same, it is to be presumed that

the deed was duly delivered, and in immediate execution of the purpose for which it was made. This presumption is not conclusive, it may be rebutted, and it is for you to say, from all the evidence bearing on the point of the time of delivery, whether it has been rebutted. If it was delivered to W. D. Thornton or his wife, or to either of his daughters named in it, that would be a good delivery as to all the parties beneficially interested under the deed of gift. The next ground on which the defendant resists a recovery by the plaintiffs is this: that even if Daniel Thornton did convey to plaintiffs the property in dispute, in the year 1838, and even if the deed was then delivered, still, if Reuben Thornton, for a valuable consideration, without notice of the deed of gift, he Reuben Thornton by such subsequent purchase took a good title to the negroes in dispute. These are the positions contended for by counsel for the defendant. The law on this point is this: when a party takes or claims property under a deed of gift, he or she is what the law calls a volunteer, that is to say, they paid nothing for the thing they claim.

Such a party, that is to say a volunteer, must yield to a party who claims under a younger or subsequent conveyance, for a valuable consideration without notice of the prior claim. If he had notice of the prior deed of gift, then the Law does not require the volunteer to yield to him. Notice may be either actual or constructive. If the party claiming under a deed of gift, records it, or it is recorded according to law, this is constructive notice, and sufficient notice. But there is no evidence that Reuben Thornton had such notice, for there is no evidence that this deed of gift was recorded according to law? It appears from the Clerk's entry on the back of it that it was recorded, but not that it was recorded according to law. Actual notice is actual information conveyed to the party personally of the existence of the deed of gift. The question for you is, did Reuben Thornton have this actual notice. To show that this notice was received by Reuben Thornton, the plaintiffs introduce the testimony of John Adams and Thomas J. Adams, and to show the contrary, the defendant introduces the testimony of Jeremiah S. Warren. It is for the Jury to weigh this evidence, and to determine whether there is a conflict between the Adams' on the one hand, and Warren on the other. It is your duty to reconcile the testimony of these witnesses with each other, so as to

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make the whole stand if you can do so. There is nothing in the testimony of the Adams' on the one part, and Warren on the other part, necessarily in conflict; the whole of it may be true. It is for the Jury to say whether the conversation testified to by Warren was not itself notice of the voluntary outstanding title relied on by the plaintiffs, or what it did demonstrate. In connection with this matter, the Supreme Court say: "notwithstanding that conversation, Reuben Thornton may have received reliable information of the existence of this deed of gift." They state this, not to induce you to believe that he did, or did not receive such reliable and certain information, but only as a reason for correcting one of the errors of this Court. I will here also bring to notice for the consideration of the Jury, the presumption against the *bona fides* of the purchase at Sheriff's sale, arising from the warranty deed which Reuben Thornton took from Daniel Thornton to support the title by purchase at the Sheriff's sale of these same negroes. But this presumption is not conclusive; it may be rebutted, and it is for the Jury to say, whether it is rebutted in the evidence. The actual notice required by law to make invalid a subsequent purchase, must be given at or before such subsequent purchase. No notice given to Reuben Thornton after he purchased would invalidate his purchase. A mere rumor brought to the knowledge of Reuben Thornton, at or before the sale, or a general report that there was an outstanding claim or conveyance without defining the nature of the claim or conveyance, by, and to whom made, &c., is no notice to Reuben Thornton. After considering all the evidence, if you believe Reuben Thornton had actual notice, of the prior deed of gift, and that the defendant took the property by gift or bequest from Reuben Thornton, then the defendant cannot defend himself on the ground that his father bought for money without notice. If on the contrary, you believe that Reuben Thornton did not have this actual notice, and that he bought for a valuable consideration, then he took a good title, and his son by gift or bequest from him, would also have a good title. The negroes mentioned in the deed, are only Ann and her child Sina, but if the plaintiffs have made out their claim and right to recover Ann and Sina, according to law and evidence, they have an equal right to recover their natural increase, all of it, that you believe the defendant converted into his own use be-

fore the bringing of this suit. When the testimony is conflicting, (if you believe, after looking into it, that any part is conflicting,) the Jury may consider which is the most natural and probable, and decide accordingly. They should also take into consideration the capacity and intelligence of different witnesses, and if they believe that one of the witnesses was called on by the parties at the time of the transaction, to bear witness to it, or was deliberately consulted by them, such circumstances are for the Jury to consider in favor of giving special weight to testimony of such witness. But such circumstances are not conclusive, but may be overborne in the minds of the Jury by others. If you cannot reconcile the testimony of the Adams' with that of Warren, and should be of the opinion that it is conflicting, then the only issue is, not whether Warren heard what he relates, but also whether the facts stated by him are sufficient to make you believe that the Adams' did not speak truly, or were mistaken in the matter stated by them. The testimony of Warren relative to a conversation between himself, Reuben Thornton, Daniel Thornton and William D. Thornton, was not admitted before you to show the truth of what was stated by any of the parties to that conversation. If it were used for such a purpose, it would be only hear-say as to these plaintiffs. It was admitted only for the purpose of showing the fact, that such a conversation did take place, in order that that fact might be urged in the consideration of the case, and to have such weight as the Jury might believe it entitled to. If Reuben Thornton had notice of the prior conveyance, although it was denied by William D. Thornton and Daniel Thornton, still he is bound by the notice, and did not get a good title by his purchase. The Jury are to determine whether he had this notice or not, by all the facts of the case. You are to come to your decision from the evidence, and the Law given you in charge, and from no other sources. You must understand the Court as expressing no opinion whatever as to the facts; of these you alone must judge. If in your opinion, there is an irreconcilable conflict in the testimony, you must base your decision on the preponderance of evidence. You need not believe any part of it to be true beyond a reasonable doubt, in order to find it true, but you need believe it only to a reasonable certainty."

At the close of the foregoing charge, counsel for the plain-

tiffs requested the Court to charge the Jury as follows, that is to say:

"The Jury must be satisfied from the circumstances in testimony, that the deed from Daniel Thornton to plaintiffs was made to defraud creditors or purchasers, before they can set it aside, even if there were no notice to Reuben Thornton prior to the sale."

The Court refused so to charge.

Plaintiffs counsel also requested His Honor to charge the Jury as follows, to-wit:

"Unless the voluntary deed to plaintiffs was fraudulent, it vested in them an interest in the property so soon as it was delivered, which could not be destroyed by any sale made by Daniel Thornton, the maker, or by any officer selling the property as his."

The presiding Judge gave this charge with the following qualification, to-wit: "The right of the plaintiffs would not be destroyed by the subsequent deed by Daniel Thornton or the Sheriff, but the fact, if it be a fact, that Reuben Thornton took such subsequent deeds for a valuable consideration, without notice of the prior deed of gift, would destroy their right to sue him, or any person holding under him, for the property."

The Jury came into Court with a verdict "for the defendant."

Before the verdict was received and entered as such, counsel for plaintiffs moved the Court to poll the Jury, which motion the Court granted, and the Jury were polled.

When the tenth Juror was called, and was asked the question: "How do you find, for the plaintiffs or for the defendant?" he answered, "I am not fully satisfied, but I could find no other verdict with the lights before me." The Juror was again asked the question, and answered as follows: "I don't know that I can answer that question."

The presiding Judge then said to the Jury: "The verdict not appearing to be unanimous, you must retire gentleman and bring in a unanimous verdict. I trust, gentlemen, that you will not consider that either the Court or the counsel have detained you thus long, on a matter in which you have no interest, merely to harrass you. We are all doing merely our duty which the law compels us to perform. It is my duty to receive no verdict that is not unanimous; and Mr. Har-

man having answered to the question, "How do you find, for the plaintiffs or for the defendant?" "that he don't know that he can answer the question," neither agrees or disagrees to the verdict. The Law, though, requires that he agree to it, and he not agreeing, you have nothing to do but to retire to your room, and let him, and others that agree with him, convince you that you are wrong. You must discuss and deliberate. For that purpose you are sent out. Retire gentlemen and make up your verdict."

The Jury returned the same verdict as before, and at the request of plaintiffs' counsel the Jury was again polled.

Counsel for plaintiffs requested the Court in polling the Jury, to ask each Juror whether the verdict was his verdict, and had the approbation of his judgment, which request the Court refused.

Counsel for plaintiff also requested the Court to require each Juror to answer for himself, and without reference to what any of his fellows may have answered before him, and to request any Juror, who shall say anything about being fully satisfied, to state whether he is fully satisfied with the verdict now. This request was refused by the Court.

In polling the Jury the second time, the same form of question was adopted as at first, in answer to which, seven of the Jurors said: "for the defendant," one said, "I find for the defendant, but am not fully satisfied with the evidence before us;" one said, "I am not fully satisfied, but with the lights before me, I can find no other verdict but for the defendant;" one said, "I am not fully satisfied that I am right, but I find for the defendant;" one said, "I did not understand you before, I am not fully satisfied, but I find for the defendant;" and one said, "I am not fully satisfied, but with the testimony we had before us, I find for the defendant."

The verdict was then received and entered as the unanimous verdict of the Jury.

Counsel for plaintiffs then moved for a new trial of said case on the following grounds:

1st. Because the verdict was not the unanimous verdict of the Jury.

2d. Because five of the Jurors, when polled, in effect, denied that the verdict was their verdict, and their answers show that the said verdict did not receive the approbation of their

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3d. Because the Court erred in refusing to poll the Jury according to the form of question and requirement, requested by counsel for the plaintiffs as herein before stated.

4th. Because the Court erred in the remarks and instructions which he made and gave to the Jury in sending them back to their room after the first polling, and also erred in giving them any instruction at all at that time.

5th. Because the Court erred in allowing the verdict to be entered on the minutes.

6th. Because the Court erred in refusing to charge the Jury as requested by counsel for plaintiffs, and adding the qualification to the charge as requested, and herein before set forth.

7th. Because the Court erred in permitting the witness, Jeremiah S. Warren, to testify as to the sayings of Reuben Thornton, Daniel Thornton, William D. Thornton, or himself, as set forth in the brief of the testimony.

8th. Because the Court erred in allowing the *fi. fa.*, the newspaper, and the testimony of William H. Adams, to go to the Jury as evidence.

9th. Because the charge of the Court, was contrary to law, and not sustained or authorized by the evidence.

10th. Because the verdict is contrary to law, and contrary to, and not authorized by, the evidence.

11th. Because the verdict is against the weight of evidence.

This motion was overruled, and a new trial refused, and the writ of error is prosecuted in this case to reverse that decision.

VANDUZGER and WASDEN & NELMS, for plaintiffs in error.

HESTER & AKERMAN, for defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

This was an action of Trover for Slaves, tried at the September Term, in 1860, of the Superior Court of Elbert county.

The plaintiffs relied upon a deed of gift from Daniel Thornton, dated 17th November, 1838.

Defendant, who claims under Reuben Thornton, relies,

First, upon a Sheriff's deed to Reuben Thornton for said slaves, reciting that they were levied upon by virtue of an execution against Daniel Thornton, and others, duly advertised and sold to Reuben Thornton as the highest bidder, on the first Tuesday in February, A. D., 1841. The *fi. fa.* with proper entries of these proceedings, and the advertisement were also in evidence. Secondly, upon a bill of sale, with warranty of title from Daniel Thornton to Reuben Thornton, dated 27th April, A. D., 1841. He deduces title to himself by the last Will and Testament of his father, the said Reuben Thornton. Such is the documentary title, showing that both parties claim under Daniel Thornton. There was considerable oral evidence to support or invalidate the one title or the other. The plaintiffs rely upon the seniority of their title. Defendant attacks it upon the ground that it was a voluntary conveyance—not delivered at the time of its execution; that there is no evidence when it was delivered, or that it was ever in the possession of either of the grantees, or of any other person than the grantor at any time anterior to the Sheriff's sale, at which his testator purchased. He insists that he is entitled to hold the property, under the Sheriff's sale, against the plaintiffs. First, because their deed was void for want of delivery. Secondly, because if their deed was actually delivered before the Sheriff's sale, he, being a subsequent purchaser for a valuable consideration, without notice of the prior voluntary conveyance, should be preferred in Law to the volunteers.

There are sundry exceptions taken to the charge of the Court as delivered, and to the refusal of the Court to give certain charges as requested in writing by plaintiffs' counsel. The charge itself, is given in extenso, and the exceptions set forth in the bill of exceptions.

1. The first error alleged, consists in the charge, that if the Jury believed, from the evidence, that the sale was made by the Sheriff, or by Daniel Thornton, to Reuben Thornton before the delivery of the deed of gift, by Daniel Thornton, to the parties in interest, or one of them, or to some one else or them, then the plaintiffs cannot recover, whether Reuben Thornton had notice of the deed of gift or not; that it was important to determine, in this case, whether the deed was delivered before or after the alleged Sheriff's sale; that if the voluntary deed was found in the possession of Sarah

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Thornton, (wife of Daniel Thornton) who took an interest under it, it is to be presumed that the deed was duly delivered, and in immediate execution of the purpose for which it was made, but that this presumption is not conclusive—may be rebutted—and that it was the province of the Jury to say whether or not it had been rebutted, and generally to consider and determine, from the evidence, all the facts involved in this branch of the case.

Such is, in substance, the charge complained of, and we see no error in Law contained in it. But it is said the Court assumed, in so charging the Jury, that there was evidence before them of a character to rebut that presumption of Law, when, in fact, there was none; and that this assumption, by the Court, misled the Jury and deprived the plaintiff of the benefit of the legal presumption.

This exception is not well taken. The evidence discloses the fact, that at the time of the signing of the voluntary deed no one of the donees was present, and that it was not delivered to any person for them. This is the evidence of one of the subscribing witnesses, and is unquestionably in rebuttal of the presumption that the deed was delivered in “*immediate*” execution of the purpose, &c.

It raises the contrary presumption, that the donor did not intend immediate delivery, otherwise he would have had one of the donees present to receive the deed, or have delivered it to some other person for them. Again, the facts that the levy, advertisement, and sale by the Sheriff (being all official and public acts) had induced no notice of the prior voluntary conveyance at the time of the sale; that at the time of the Sheriff’s sale, the voluntary deed had not been recorded; that there was no evidence of its having been in the possession of any of the donees, or out of the possession of the donor, until 1845, (four years after the Sheriff’s sale) were all circumstances proper to be considered and weighed against the presumption of immediate delivery, or of delivery at any time anterior to the sale by the Sheriff. Had the Court below failed to give the qualification complained of, injustice would have been done the defendant.

2. The second error complained of is, that the Court, in charging the Jury, after calling their attention to “the presumption against the *bona fides*, of the purchase at Sheriff’s sale, arising from the warranty deed which Reuben Thornton

took from Daniel Thornton, to support the title by purchase at Sheriff's sale"—added, "but this presumption is not conclusive—it may be rebutted, and it is for the Jury to say whether it is rebutted in the evidence."

It is said that the Court by *this* qualification, "perverted the evidence, misled the Jury and encroached upon their province," &c. We are wholly unable to see in this, any perversion, misleading, or encroachment on the part of the Court. Doubtless it was argued in that Court, as here, that the subsequent warranty, obtained by Reuben Thornton, was no evidence of *mala fides*. Courts should always, in charging Juries, as to presumptions, be careful to inform them that they are not conclusive, that they may be rebutted, lest they should infer the contrary. A mind educated in the law would not require to be so guarded, but one not so educated, without the qualification, would very probably be misled by the proposition. The Court did not tell the Jury that there was sufficient rebutting evidence, or any rebutting evidence; but simply that the presumption urged by plaintiff's counsel, might be rebutted by evidence, and referred the question to them. There is no error in this.

3. The third assignment of error in the charge, is, that the Court said to the Jury: "A mere rumor, brought to the knowledge of Reuben Thornton, at or before the sale, or general report, that there was an outstanding claim or conveyance; without defining what sort of claim or conveyance, to whom, or by whom, &c., is not notice to Reuben Thornton."

The Law is here correctly stated. The proposition is a simple truism, and the objection to the annunciation of it, that it was calculated to make the impression on the minds of Jurors, that Reuben Thornton had no other notice, is forced and illogical.

4. The fourth assignment of error is, that the Court charged the Jury, "that if they believed that one of the witnesses was called on, by the parties, at the time of the transaction, to bear witness to it, or was deliberately consulted by them, such circumstances are to be considered by the Jury, in favor of giving it special weight, but such circumstances are not conclusive, but may be overborne in the minds of the Jury by others." This is simply suggestive to the Jury, that they may well consider, whether or not, the fact of a person being

specially called on by the parties to bear witness of what transpired between, or being specially consulted by them, was calculated to impress more strongly on his mind, what did transpire, and whether or not his recollection of the facts was more reliable than if he had been casually a witness. It is a general rule, very generally expressed, to aid them in weighing evidence not applied to any one witness—and not, therefore, calculated to create an improper bias. If the Jury applied it to the testimony of any one witness, that there was a case for the rule. If they did not, they were not misled.

5. The next error assigned, is in the following charge to the Jury: "When a party takes or claims property under a deed of gift, he or she is what the law calls a volunteer; that is to say, they paid nothing for what they claim. Such a party, (that is to say a volunteer,) must yield to a party who claims under a younger, or subsequent conveyance for a valuable consideration, without notice of the prior claim. If he had notice of the prior deed of gift, then the Law does not require the volunteer to yield to him."

This charge, as affirmatory of a general rule of law, applicable to the case at bar, might readily be sustained by numerous authorities, but it is sufficient to adduce four decided cases which were binding upon the Court below, viz: *Fleming vs. Townsend*, 6 *Geo. Rep.* 103. *Fowler vs. Waldrip*, 10 *Geo. Rep.* 350. *Harper vs. Scott*, 12 *Geo. Rep.* 125. *Jordan vs. Pollock*, 14 *Geo. Rep.* 145.

We now add another on the point:

Exception is made to the refusal of the Court to give certain charges, asked for by the Plaintiff's counsel. These are not set forth in the exceptions, but we have referred to them as elsewhere stated, and believing that they could not have been given in consistency with other portions of the charge, which we have already reviewed and approved, and would probably have made on the minds of the Jurors, the erroneous impression, that it was incumbent on the defendant to adduce proof of fraud in the making of the voluntary conveyance, other than the presumptive evidence furnished by the subsequent sale, for a valuable consideration, to a *bona fide* purchaser, without notice of the prior voluntary conveyance. We overrule this exception.

7. When the verdict was returned and read, plaintiffs counsel

asked that the Jury be polled, and this was done. One of the Jury answering that he could not say, whether he found for plaintiff or defendant, the Court declined to receive the verdict, and remanded them to their room.

They came a second time into Court with the same verdict, and were again polled. Exception is taken to the manner in which the question was propounded to each Juror, viz: "Do you find for the plaintiffs or the defendant?" The better form of question would be, (following the reading of the verdict,) "What say you, Mr. Juror, is that, or is it not, your verdict?" But as there is no complaint in this case, which does not go to the whole verdict, we think the question, as put, equivalent, and therefore overrule the exception.

8. But it is further excepted that the motion for a new trial should have been sustained, and the verdict set aside, on the ground that the answers made on the polling of the Jury, show that the verdict was not unanimous.

The greater number of the Jury answered simply that they found for the defendant.

Some four or five added, either "that they were not satisfied," or "that they were not *fully* satisfied," or said, "that they were not satisfied, but with the lights before them, they found for the defendant."

They all, however, did say that "*they found for the defendant*," which was the verdict read in the Court. Is it requisite that to sustain a verdict, that Juror should be wholly free from doubt, should be "*fully satisfied with it*?" If so, what shall become of cases turning upon a preponderance of evidence? Where the preponderance is not great, shall freedom from doubt be exacted? Are such cases never to be decided?

In this case the Jury pursued the course proper in the absence of clear and satisfactory evidence; they left the parties as they found them; they conformed to the ancient maxim of the law, "*portior est conditio defendentis*." The verdict was properly received and recorded.

9. It is objected that the Court below erred in admitting the evidence of Jeremiah S. Warren, detailing the conversation between Daniel Thornton, William D. Thornton and Leuben Thornton, relative to a prior voluntary conveyance of this property, and occurring immediately preceding the sheriff's sale. Both parties claim under Daniel Thornton.

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William. D. Thornton was the father and natural Guardian of the grantees, (in the voluntary conveyance,) then under age, and took himself a usufruct for a time in the property, and was therefore the person to whom such a conveyance, if ever perfected, might naturally be expected to be delivered. Reuben Thornton being urged to buy the property at the impending Sheriff's sale, having heard a rumor that Daniel Thornton had previously conveyed it to somebody, or there was an outstanding title, in order to satisfy himself, goes to the two persons, most likely to be informed, taking with him a witness, and asks information. Under all the circumstances, we think this evidence was properly admitted, if for no other purpose, to throw light upon the question of notice, *vel non*, to the second purchaser, of the prior voluntary conveyance.

10. The only remaining exception is, that the Court erred in refusing a new trial, on the ground that the verdict was contrary to evidence, and to the weight of evidence. We cannot say that we are dissatisfied with this verdict. It is certainly not "strongly and decidedly against the weight of evidence." It concurs with a previous verdict of a special Jury.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be affirmed.

HOWELL vs. THE LAWRENCEVILLE MANUFACTURING COMPANY *et al.*

To discharge securities to a note, by giving indulgence to the principal, it is necessary that the creditor should know the character in which the parties signed the paper. And it is error in the Court to assume that this fact has been proven, when there is a conflict of testimony upon the subject.

Complaint, in Gwinnett Superior Court. Tried before Judge HUTCHINS, at November adjourned Term, 1859.

This was an action brought by Evan Howell, against The Lawrenceville Manufacturing Company, and Jesse Lowe, James Garmany, and Merit Camp, to recover the amount due on a promissory note, of which the following is a copy:

“3,701 98.

“LAWRENCEVILLE, May 9th, 1856.

“Thirty days after date the Lawrenceville Manufacturing Company will pay to Evan Howell, or bearer, three thousand seven hundred and one ,⁰⁰/₁₀₀ dollars, value received, with interest from date.

“J. S. PETERSON,
Ag't Law. Man'g Co.,
“JESSE LOWE, Pres't,
“JAS. GARMANY,
“MERIT CAMP.”

There was a credit on the note of nineteen hundred dollars, dated 28th July, 1856.

To this action the Lawrenceville Manufacturing Company and James Garmany set up no defence, but Lowe and Camp pleaded, that they were but the securities of the Company, and that Howell had indulged the Company to their injury, for a consideration, and that therefore they were discharged from liability on the note.

The testimony adduced on the trial exhibited the following state of facts, to-wit:

The note sued on was given for eighty bales of cotton. The cotton was purchased by Peterson, the Agent, for the use and benefit of the Company, and by the authority of the Board of Directors. At the time the trade was made, it was

agreed that the Agent should make a note, signed by himself as Agent of the Company, and by Jesse Lowe, John Mills, Hiram R. Williams, Joseph P. Brandon, and James P. Simmons, who were the Directors. The Agent testified: That all of the parties to the note, except himself, were stockholders in the Company, and signed the note as sureties only, but it did not appear in the evidence that the plaintiff had any knowledge of the character in which the defendant signed the note; he was not present when the note was signed, and did not know whether Lowe, Garmany and Camp signed the note as sureties or joint makers; the note was signed and sent by mail to plaintiff's son and Agent in Atlanta; Lowe was the President of the Company at the time the note was given; some time in September, 1856, the plaintiff demanded payment of the balance due on the note, which the Company were at the time unable to pay, and it was then agreed by and between the plaintiff and the Agent, and Garmany, who was then President of the Company, that the plaintiff would indulge the parties twelve months longer on the note, and in consideration of such indulgence, he should receive sixteen per cent. interest on the sum due; in furtherance of this agreement, a note was given by the Agent, with Garmany as security, for about one hundred and sixty dollars, payable to the plaintiff, upon which note one hundred dollars was afterwards paid.

The testimony being closed, the presiding Judge, amongst other things, charged the Jury:

"That if they believed, from the evidence, that Lowe signed the note as President of the Company, to bind the Company, and not to bind himself individually, that he was not personally bound.

"That the members of the Company, though interested therein, may be the securities of the Company, and that though thus interested in the Company, they are entitled to all the rights of securities under other circumstances.

"That if the Jury should believe, from the evidence, that Camp signed the note as security, and that indulgence was given to the Company by the plaintiff, without the knowledge or assent of the security, the security was discharged."

The Jury returned a verdict in favor of the plaintiff, against the Company, and Garmany, for the sum due on the note, and in favor of Lowe and Camp.

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Counsel for plaintiff then moved for a new trial on several grounds, only one of which was considered by the Court, to-wit:

That the Court erred in giving the charges before set forth.

The motion for a new trial was heard at the March Term, 1860, and overruled by the presiding Judge, and his refusal to grant the new trial is the error assigned in this case.


PEEPLS, and CLARK & LAMAR, for plaintiff in error.

GREEN & SIMMONS, and WINN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

For the double purpose of simplifying and shortening the decision in this case, I shall confine myself to the third ground of alleged error in the motion for a new trial. The Court charged the Jury: "That if they should believe, from the evidence, that Camp signed the note as security; and if they should further believe that indulgence was given to the Company by plaintiff, without the knowledge or assent of the security, the security was discharged."

The legal proposition thus stated by the Court is not Law; for it may be true, that Camp signed the note as security, and that indulgence was given by the plaintiff to the Laurenceville Manufacturing Company, without the knowledge or assent of Camp, and still he is not discharged, unless the plaintiff *knew* that Camp signed as security. His Honor the presiding Judge, instead of *assuming* this fact, and thereby excluding it from the consideration of the Jury, which he had no right to do, should have submitted it to the Jury, for them to find upon the proof submitted. It may be argued that the payee of a note must necessarily know who is principal and who security; and ordinarily he does. But this is not necessarily and always true; and we think the evidence in this case justifies this conclusion. Take the testimony of Mr. Peterson, the Agent of the Company, who made the note. He says it was the *practice* for the Agent and President to sign notes in their official capacity, and that often the President and Directors signed immediately underneath *as securities*; which names were embraced in a bracket, and



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at the end the word securities, wrote across the note. He further testifies: "I cannot say whether the plaintiff knew in what character the parties signed the note or not, but I know I promised him a note *made in the usual way, with the Board of Directors as securities.*" He says: "It seems to me that plaintiff must have known them as securities," but adds, "the note itself must decide its classification."

Thus, it will be perceived that Mr. Peterson, who swears most conscientiously, I doubt not, does not state that Mr. Howell *knew* that Lowe and Camp signed this note as *securities only*. And why should he? The note is not such as it was the practice to give; neither is it such as was promised by Mr. Peterson to Howell. He was not present when it was given. He might well have supposed that it was intended to bind the Corporation as such, and Lowe and Camp *individually*, and not as securities; they being stockholders and interested in the consideration of the note, namely: the lot of cotton bought for the Factory.

But be that as it may, was it not a fact to be left to the Jury, without any expression or intimation of an opinion from the Court, whether or not it was proven, much less an assumption by him in the charge complained of, that it was proven?

Thus stands the case, then, as received in the light of the defendant's proof. Mr. Singleton G. Howell, a prominent actor in this business, was present at the interview between the plaintiff and Mr. Peterson when negotiating about this cotton. He deposes that Mr. Peterson was to make a note signed by him, as Agent for the Company, with the names of the Directors, and transmit the same to witness, by mail, when the cotton was to be shipped from Atlanta. The note sued on was sent, which was regarded by witness as satisfactory. That before he received it, the cotton was forwarded by mistake to Lawrenceville, and he did not stop it. He avers emphatically and positively, that although present at the conversation between Peterson and Howell, that "he (the witness) knew nothing of the character in which any of the parties signed the note save Peterson, the Agent, except from its face, nor did my father, the plaintiff, so far as I know. The note passed into plaintiff's hands through me."

Does not the answers of both witnesses rebut, effectually, the ordinary presumption that the contractee knows which of

the contractors were principal and which security? At any rate, is it not a fact subject to be referred to the Jury, under the circumstances of the case? We cannot entertain a doubt upon this subject.

It may be said that, if the Court charged the Law correctly as far as he went, but omitted to charge the whole Law applicable to the point, that the omission is not a reversible error, unless his attention was called to it by counsel. And while this is a sound proposition in most cases, yet this charge cannot be justified upon this ground. For the charge, as given, we repeat, is admitted not to be maintainable without further qualification. And we close as we began, by holding that Lowe and Camp may have signed as securities, and indulgence may have been given by the creditor to the principal debtor, without their knowledge or assent; still, they are not discharged, *unless* the defendants go further and show that the plaintiff knew that they were securities only to the contract. This they have attempted to do, whether successfully or not, it is not for this Court to say, much less for the Court below to assume in the charge *sub judice*. There is a contrariety, not to say conflict, of evidence upon this point. If the note is to be judged by its face, it is a clear case for the plaintiff. Neither Mr. Peterson testifies to the knowledge of the plaintiff, as to the character in which the makers signed, nor does Mr. Singleton G. Howell. The one thinks he must have known, and assigns the reasons for his belief. The other, who transacted the business, asserts positively that he was ignorant upon this point, and his father likewise, so far as he knows, and gives the grounds of this opinion. And I would add, that the variance in their depositions, as to what was said at the house of Singleton G. Howell, by Peterson and plaintiff, is not the case of positive and negative proof. The attention of both was called to the transaction. Peterson says the Directors were to sign as securities, which, by the way, they never did; and Howell swears that they were to sign *individually*, which Lowe and Camp did. It is the legitimate office of the Jury to decide between them, under all the circumstances of the case.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court.

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that the Judgment of the Court below be reversed, upon the ground that the Court erred in charging the Jury, "that if they should believe, from the evidence, that Camp signed the notes as security, and if they should further believe that indulgence was given to the Company by plaintiff, without the knowledge or assent of the security, the security was discharged." The Court thus assuming the fact that it was established by the proof, that Howell had knowledge that Camp was security *only*, to the notes.

LYNCH vs. JACKSON.

1. "To determine whether a former recovery is a bar to a subsequent action, a good test is, whether the same evidence will support both actions."
2. Where a suit is brought against one individually, and he defends under the title of another, to make the judgment a bar in another suit, at the instance of that third person, the *pleadings* should show that there was privity in representation between the defendant and that third person.
3. When a trust terminates before final judgment in a case, the *cestui que trust* should be made a party by notice or otherwise to the proceeding; otherwise, the judgment is no bar.

Trover, in Warren Superior Court. Tried before Judge THOMAS, at the April Term, 1860.

This was an action brought by Ellen R. Lynch, against Archibald M. Jackson, to recover damages for the alleged conversion, by the defendant, of a negro girl by the name of Susan, belonging to the plaintiff.

The facts of the case are substantially as follows:

Some time in the year 1850, Barnard W. Fickling, the grandfather of the plaintiff, gave, by parol—accompanied with actual delivery—the negro girl in dispute to the plaintiff, at the same time telling the mother of the plaintiff to

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take charge of the negro and learn her to sew, &c., until the plaintiff married, or became of sufficient age to control and manage the negro herself. Barnard W. Fickling died in 1851, and the defendant, Jackson, was appointed and qualified as executor of his Will. As such executor, he instituted an action of Trover for the negro in dispute, returnable to the April Term, 1852, of Warren Superior Court, against Edward F. Lynch, the father of the plaintiff. Edward F. Lynch set up, by way of defence to the action, that the title to the negro was in Ellen R. Lynch, by virtue of the parol gift aforesaid. In that action a verdict and judgment was rendered in favor of Jackson, as executor as aforesaid, against Edward F. Lynch, for the value of the negro, to be discharged by delivering her up in ten days. The verdict was rendered at the April Term, 1857, and the judgment signed up on the 16th of April, 1857. Ellen R. Lynch attained the age of twenty-one years on the 24th of October, 1856.

On the 16th of September, 1857, this action was commenced, and on the trial, the defendant offered in evidence the record and judgment of the former action in his favor as executor of Fickling, against Edward F. Lynch; to which counsel for plaintiff objected, on the ground that the judgment was no bar or estoppel of the plaintiff in this action.

The presiding Judge overruled the objection, and admitted the record.

After the testimony had closed, the Court charged the Jury:

"That the plaintiff was estopped by the record of the former suit, and that the Jury ought to find for the defendant."

The Jury found according to the Judge's direction, and the plaintiff in error prosecutes his writ, to reverse the judgment, on the ground that the Court erred in admitting the record of the former action, and in charging the Jury that he plaintiff was estopped by it.

E. H. POTTLE, for plaintiff in error.

WASDEN & NELMS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Conceding that Susan, the negro in dispute, was given to

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Adeline Lynch, by Barnard F. Fickling, in trust for his granddaughter, Ellen R. Lynch, and that the trust vested in Edward F. Lynch, the husband of Adeline, and father of Ellen R., which is exceedingly questionable, was the judgment in the former suit between Archibald M. Jackson, executor of Barnard W. Fickling and Edward F. Lynch, a bar to the present action?

That was an action of Trover brought by the executor of Fickling against Edward F. Lynch, *individually*. The plea of the defendant is not in the record. It is admitted that it set up an outstanding title to the girl Susan in Ellen R. Lynch, under a parol gift from her grandfather in 1850. So far as appears, defendant, Lynch, did not, *by his plea*, put himself in privity with Ellen R.'s titles, if, indeed, he did or could legally represent that title; and will it be seriously contended that if a defendant in trover or ejectment sets up a paramount outstanding title in another, and a recovery is had against the defendant, that the proceeding will estop that third person, in whom defendant set up title, from suing?

The Judges in convention in *Crockett vs. Benton*, (*Dudley's Rep.*, 254,) held, and we think very properly, that to determine whether a former recovery is a bar to a subsequent action, a good test is, "whether the same evidence will support both actions." And the application of this rule to this case will show the injustice that would be done the present plaintiff, by excluding the truth of this transaction from the Jury. In the former case, against Edward F. Lynch, his wife's testimony was inadmissible, whereas, in the present suit, the testimony of the mother is competent, and if credible, is conclusive as to the gift from her father to her daughter. If there were nothing else wanting, then, the same evidence will not support both of these actions, and therefore the former recovery is no bar.

There is another better reason still why the judgment in the first case is no bar in this. Ellen R. Lynch was not only not represented by Edward F. Lynch, *as trustee*, when sued individually for the slave Susan, but she was over twenty-one years of age when the first judgment was rendered. If her father represented her as trustee, the trust terminated before the final trial of the first case. And she having no notice whatever of the pendency of the litigation, she

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was not bound by the result. The proof is, that Mr. Fickling gave the girl to his grand-daughter, and requested her mother to take charge of her, learning her to sew, &c., until Ellen R. became of age, or was capable of taking care of her herself. The judgment in the first case was in April, 1857, and the plaintiff was twenty-one years of age October, 1856, at which time the trust dropped off, such as it was, and Ellen R. Lynch was *sui juris*.

For these and other considerations, we feel constrained to award a new trial in this case.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, upon the ground that the Court erred in charging the Jury, that the plaintiff was estopped by the record of the former case brought in Warren Superior Court, April, 1852, in which Archibald M. Jackson, executor of the last will of Barnard W. Fickling, deceased, was plaintiff, and Edward F. Lynch defendant, it being an action of trover.

BARKSDALE *et al.* vs. SMITH, BELL & CO.

Notwithstanding proceedings have been irregularly conducted, yet, if no principle has been violated or right infringed, and the parties have reached the same result as they would have attained if everything had been formally transacted, the matter will not be disturbed.

Assumpsit, in Wilkes Superior Court. Tried before Judge TOMAS, at the September Term, 1860.

The record in this case presents the following facts and actions, to-wit:

Barksdale *et al.* vs. Smith, Bell & Co.

Mrs. Sarah Stokes died testate. Amongst other things, she directed, in her Will, that certain property should be sold, and that the funds arising therefrom "be put at interest, the said interest to be applied to the support and education of her grandson, John A. Stokes, and the support of his father, Armstead Stokes, during his natural life, and if the said John A. Stokes should survive his father, then the whole to go to, and vest in, him and his heirs forever: *provided, nevertheless*, that if the said John A. Stokes should die before he arrives at the age of twenty-one years, or without heirs, then the interest aforesaid shall be applied to the maintenance and support of his father, Armstead T. Stokes, during his life, and after his death, the principal, with the interest, if any, to be equally divided" amongst other named legatees.

The Will further provided that the property bequeathed by it should be for the sole and separate use and benefit of the legatees, and not subject to any debts or contracts, but to be received and managed by a trustee.

There was no trustee appointed in the Will.

Nicholas G. Barksdale was duly qualified as administrator of Sarah Stokes, with the Will annexed, and before any trustee was appointed, an order was drawn on, and accepted by him, of which the following is a copy:

"September 2d, 1852.

"MR. N. G. BARKSDALE:

"Will please pay Smith, Bell & Co. one hundred and forty-five dollars and fifty-eight cents, my account with them for the year 1851, and this shall be your receipt for the same.

"A. T. STOKES."

On the back of the order was written the following acceptance:

"I accept the within, conditioned upon any funds over, coming into hand. N. G. BARKSDALE.

"October 7th, 1852."

N. G. Barksdale acted as administrator, with the Will annexed, of Sarah Stokes, from 1848 up to the time of his death, in the latter part of the year 1856.

Thomas A. Barksdale and James H. Willis were appointed administrators of N. G. Barksdale, and continued to manage

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the property bequeathed by Sarah Stokes, for the support of John A. Stokes and Armstead T. Stokes, until September or October, 1857, when William M. Reese was appointed trustee for Armstead T. Stokes and John A. Stokes.

In October, 1857, Reese and the administrators of Barksdale came to a settlement, in which it was found that there was due the trustee of the Stokeses something over \$7,000, which amount was subject to various demands against the Stokeses for support, &c., some of which were allowed in the settlement. These being deducted, left over \$5,000, which the administrator of Barksdale paid over to Reese, the trustee.

Smith, Bell & Co. sued the administrators of Barksdale to recover the amount of the draft.

The foregoing facts appearing in the evidence on the trial together with the fact that Armstead Stokes and John A. Stokes were both then living, and that the latter was a minor, the presiding Judge charged the Jury:

That if they believed the facts relative to the settlement between the defendants and Reese, that there were funds over, coming into the hands of the defendants' intestate, the condition of the acceptance was complied with, and Barksdale was liable on the acceptance.

The Jury found for the plaintiffs the amount of the draft; whereupon, the counsel for defendants moved for a new trial, which new trial was refused, and that refusal is the error complained of.

SAMUEL BARNETT, for plaintiffs in error.

HESTER & AKERMAN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Regularly, there should have been appointed, at the beginning, a trustee for A. T. and John A. Stokes to receive from the administrator, with the Will annexed of Mrs. Sarah Stokes, the funds bequeathed by her Will for the support, maintenance, &c., of her grandson and his father; but, in point of fact, none such was appointed until recently. As is usual in such cases, Mr. N. G. Barksdale, the administrator, executed the trusts of the Will. And while thus acting, accepted the draft drawn by A. T. Stokes on him, in favor of

Pierce vs. Chapman et al.

Smith, Bell & Co., the plaintiffs in the action for the drawers account with them, for the year 1851. True, the acceptance was conditional, "provided he had in his hands any funds over," meaning, we suppose, over and above liabilities already incurred for A. T. Stokes. The proof shows, and it is distinctly admitted in the argument, that the funds in hand were ample to pay this debt. The conditional acceptance, then, becomes absolute, and the estate of Barksdale, he having in the meantime died, is liable to the plaintiffs. Why should not the amount be retained by the representatives of Barksdale, in the settlement with Mr. Reese, the present trustee? We admit the irregularity of this whole proceeding, from beginning to end; and yet, after sundry and circuitous litigation in Chancery, the parties would reach the same result. If no principle, then, is violated, and no right invaded, it is better that the parties be spared this expense and delay, by affirming the judgment of the Court below.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

PIERCE vs. CHAPMAN *et al.*

Parties not appealing from a first verdict, are bound by it.

Ex. fa. and illegality, in Warren Superior Court. Decision by Judge THOMAS, at the October Term, 1860.

The facts of this case are as follows, to-wit:

Pierce Bailey recovered a judgment against William Littleton, as administrator of Lucy Bray, deceased, and Benja-

min Chapman, and Mary Hodgins, for \$1,037 75, besides interest and cost.

From this judgment, Littleton entered an appeal, Chapman and Hodgins not appealing.

On the appeal, Bailey recovered a judgment against Littleton, as the administrator of Bray, for the sum of \$700 only.

A writ of *fieri facias* was issued from the first judgment, against Benjamin Chapman and Mary Hodgins, and was levied upon their property.

The defendant filed an affidavit of illegality to the *fi. fa.*, on the ground:

That there was no judgment corresponding with the *fi. fa.*, as there had been an appeal entered from the same, and the recovery had been reduced to \$700; that they were only securities of Lucy Bray on the claim, on which the judgment was founded; that the appeal vacated the first judgment from which the *fi. fa.* issued, and that having a right to control the *fi. fa.*, as sureties, after paying it off, the *fi. fa.* should have issued against the principal, as well as the sureties.

Counsel for plaintiff demurred to the affidavit of illegality, admitting the facts stated in it, and upon hearing the demurrer, the presiding Judge sustained the demurrer, holding, that an appeal by a principal, and a diminution of the recovery on the appeal, enures to the benefit of the sureties.

This decision is the alleged error.

POTTLE, and WASDEN & NELMS, for plaintiff in error.

GIBSON and HUFF, for defendants in error.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question in this case is, whether, when the securities to the contract neglect or refuse to appeal from the first verdict, and the recovery is diminished upon the appeal, are they bound by the first or the last judgment? From the first case brought before this Court, on the Act of 1839, (*Cobb's Dig.*, 500,) down to the decision in *Durham's* case, at Macon, last July, with the exception of *Beall vs. Cochran*, (18 *Ga. Rep.*, 88,) this Court has uniformly maintained, that if any

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one or more of the defendants chose to abide by the first verdict, rather than litigate further, it was their right and privilege to do so; and until the new Code goes into operation, which, we are informed, has prescribed a different rule, we shall adhere to the previous adjudications.

It was comparatively easy to say, that one person should control five, or force them to litigate further, whether they wished to do so or not, and even at the risk of having them mulct in much heavier damages. But whether this is wise or just, is not proper, perhaps, for me to express any opinion.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be reversed, on the ground that the Court erred in sustaining the affidavit of illegality filed by the defendants in this case.

SALMONS vs. TAIT.

In an action of Trespass brought by A. against B. for forcibly entering upon his premises, and cutting down and carrying off his timber trees, and removing his fence and gate. C. was examined as a witness in the case, and not only testified as to the particular injury charged in the Court, but also as to the damage done the plaintiff's stock; denying that he (the witness,) had any interest in the same. *Held*, that all these statements were material in the case, and that if he swore knowingly, wilfully, absolutely and falsely, as to any of them, he was guilty of perjury.

Case for Words in Elbert Superior Court. Tried before Judge THOMAS at the September Term, 1860.

The opinion of Mr. Justice Lumpkin, who pronounced the judgment of the Court in this case, embodies all the facts ne-

cessary to a clear understanding of the judgment, wherefore any other statement is omitted.

VANDUZER, for plaintiff in error.

HESTER & AKERMAN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

William B. Nelms brought an action of Trespass against Edward B. Tait in Elbert Superior Court. The injury alleged was, that the defendant had forcibly entered upon the land of plaintiff, cut down, destroyed and ruined the trees growing therein; threw down the fencing and carried away his gate; laying his damages at five hundred dollars. He received one hundred and two dollars with cost.

On the said trial, one Burrell Salmons was sworn and examined as a witness, who testified that there were one hundred or two hundred panels of fence from the road to the gully; entirely on Nelms' side of the line; that a sow belonging to Nelms was so cut by Tait, that witness had to carry her food and water where she laid for a week; that he had no interest in the stock of hogs, but was a mere cropper on Nelms' plantation.

Edmund B. Tait, the defendant in both actions, referring to this testimony said, that Salmons "had sworn to wilful lies;" thereby meaning, as Salmons alleges in declaration, to charge him of being guilty "of wilful and corrupt perjury." Defendant Tait, by his plea of justification, admitted that he spoke the words complained of, and that he intended the meaning which the plaintiff imputes to them.

Upon the trial, the plaintiff moved to strike out so much of the plea as relates to so much of the evidence of the plaintiff in the Trespass case, as relates to the sow and his interest in the stock of hogs, as not being material or applicable to any matter in question at issue in the suit between William B. Nelms and Edmund B. Tait. He also objected to any testimony concerning this statement made by him upon his examination, and as to the truth or falsehood of these statements; all of which were overruled by the Court; and the Jury were instructed, that if they believed that Salmons in his evidence, wilfully, knowingly, absolutely and falsely

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made the three allegations set forth in the defendant's plea, or either of them, as to the number of panels of fence on Nelms' side of the line; the injury done to the sow, or his want of interest in the stock of hogs, then Tait had sustained his defence, and Salmons was not entitled to recover.

The jury found a verdict for the defendant, and the plaintiff moved for a New Trial, on the following grounds, to-wit:

1. The Court erred in refusing to strike out that part of the defendant's plea relating to the sow, and the interest of plaintiff in the stock of hogs, when it appeared from an inspection of the record of the Trespass case of Nelms vs. Tait, that there was nothing therein concerning said sow or stock of hogs.

2. In admitting evidence of the statements of plaintiff respecting the sow and stock of hogs.

3. In charging the Jury that if they believed from the evidence, that the plaintiff Salmons, was a witness in the case of Nelms vs. Tait, and made upon oath, wilfully, knowingly, absolutely and falsely, the three allegations set forth in the defendant's plea, or either of them, then Tait has made out his defence, and the plaintiff is not entitled to recover.

There were four other grounds relating to the testimony which were not relied upon in the argument, and which we deem it unnecessary to notice.

The Court refused to grant a New Trial, and the defendant excepted.

The defendant charged the plaintiff with "swearing to lies," which the plaintiff alleges meant to impute to him perjury. If Salmons swore falsely as to the sow, and to his interest in the stock of hogs, as well as to the quantity of fence on Nelms' side of the line, did he "swear to lies?" Most assuredly. If on the other hand, the words spoken impute perjury to the plaintiff, and he testifies wilfully, knowingly, absolutely and falsely as to the fence, is he not guilty of perjury? There can be, we apprehend, no doubt of it. In either view of the matter therefore, we think the case is with the defendant. The 2 *George* 11 c. 25, inacts that it shall be felony to steal any *bank-notes*; and it has been determined that the offence is complete by stealing one-bank note. *Hassel's case*, *Leach*, Cr. 1. If then to charge a witness with swearing to three lies, and one of the charges is sustained, and is material to the issue in the case in which he testified, you have justified the plea in imputing to him perjury.

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But altogether apart from this view of the case, the testimony of Salmons in the case of *Nelms vs. Tait*, as to the injury done to the sow, and which seems to have been admitted without objection, must have contributed to aggravate the damages found in that case, and therefore was material. The other portion of it which denied he had any interest in the hogs, was equally important as affecting his credibility, and if he swore falsely, knowingly, upon either of these points, he was guilty of perjury.

Consequently, our conclusion is, the rulings of the Court were right throughout, and that the judgment be affirmed.

JUDGMENT.

Whereupon it is considered and adjudged by the Court that the judgment of the Court below be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT
SAVANNAH, JANUARY TERM, 1861.

Present—JOSEPH H. LUMPKIN, }
 RICHARD F. LYON, } JUDGES.
 CHARLES J. JENKINS, }

LAWSON *vs.* POWELL.

The declarations, admissions and promises made by an Executor or Administrator, after being clothed with his fiduciary character, are admissible against the Estate in any suit by or against the Representative in that character.

Assumpsit in Burke Superior Court. Decision made by Judge HOLT at the May Term, 1860.

Robert R. Lawson brought an action of Assumpsit, in Burke Superior Court, against Green B. Powell, as the Executor of Zilpha Tomlin, to recover the amount of an account due from the testatrix in her life time, and when the case was called for trial at the May Term, 1859, the plaintiff proposed to read the answers of Wilson O. Davis, to interrogatories taken by commission, and duly returned into

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Court, in which the witness, Davis, testified: That he was present at the office of Alexander McKenzie, in Waynesborough, on the 3d day of February, 1857, when the plaintiff and defendant came in together, and requested McKenzie to enter some credits upon an account which the plaintiff held against Zilpha Tomlin, upon whose estate witness understood the defendant to be the representative. McKenzie did enter the credits on the account, as requested by the parties, and in their presence, and the defendant then and there said, in the presence of McKenzie, plaintiff and witness, that he would settle the balance with McKenzie, (the Attorney of the plaintiff,) and that he, the defendant, had some claims against the plaintiff, and, perhaps, a claim against McKenzie, which the parties all agreed should be received in payment of said balance as far as they would go; and McKenzie was instructed to make the settlement and receive the claims in payment, as aforesaid, at any time the defendant would come down.

This testimony was objected to by counsel for the defendant, on the ground: "That the Executor could not bind the Estate of his testator by an admission or promise."

The presiding Judge sustained the objection, and repelled the testimony; whereupon the plaintiff took a non-suit with leave to move to set aside the non-suit, and reinstate the case.

An order was taken, by consent, that the motion be heard and decided in vacation. The hearing of the motion was postponed from time to time, by consent, until the May Term, 1860, when the motion was overruled by the presiding Judge.

The decision of the Judge, refusing to set aside the non-suit and reinstate the case, constitutes the error assigned in this case.

JOHN K. JACKSON, for the plaintiff in error.

No appearance for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the Court right in rejecting the testimony of Wilson O. Davis, who was examined by commission to prove the

admissions and promises of Green B. Powell, Executor of Zilpha Tomlin, deceased, of the indebtedness of his testator to the plaintiff?

In Sample, Adm'r vs. Lipscomb, Adm'r, 18 Ga. Rep. 687, it was held by this Court, that Administrators or Executors, plaintiffs in an action, were bound by their acknowledgments in relation to the subject-matter of the suit, and that if the Estate they represented was injured by these admissions, they were answerable therefor; but that third persons must be protected in acting upon them. True, the suit in that case was instituted by the Administrator; but, in principle, it can make no difference whether the acknowledgments were made by the plaintiff or defendant. *In Fenuel vs. Gray, 21 Pickering, 243*, the Court say and decide, that the declarations of an Executor or Administrator are admissible against him, in any suit *by or against* him in that character. See also *16 Johns, 277*; *4 Cowen 49*; *5 Wend 558*.

It is now received as undisputed Law, that declarations, admissions and promises of a Trustee, after he is clothed with his fiduciary character, will take a case out of the Statute of Limitations; and that such acknowledgments are sufficient to establish the original demand against the Estate. *1 Greenleaf on Ev. § 176*, and the cases there cited in the notes. *10th Edition*.

JUDGMENT.

Whereupon, it is adjudged by the Court, that the judgment of the Court below be reversed upon this ground: We think the Court erred in rejecting the depositions of Wilson O. Davis, as to the admissions and promises of Powell, as Executor of Tomlin, and consequently adjudge, that the non-suit be set aside and the case reinstated.

HARDWICK & SMITH vs. WHITFIELD.

In a claim case, an entry that a previous levy was dismissed, by order of the Plaintiff, sufficiently accounts for the levy. The entry might require some explanation in a contest between a third person as a security, for instance, and the Plaintiff in *Fi. Fa.*

Levy and Claim in Washington Superior Court. Decision made by Judge HOLT, at the December adjourned Term, 1860.

Sundry writs of *fi. facias*, issued from a Justice's Court of Washington County, against one James D. Paradise, some in favor of Thomas W. Hardwick, and some in favor of Samuel Smith, and some in favor of other persons, were levied on four hundred acres of land in the county of Washington, as the property of said Paradise. Miles Whitfield interposed a claim to the land.

It was recited, both in the claim affidavit and claim bond, that the land had been levied on "by virtue of sundry *fi. fas.*, in favor of Thomas W. Hardwick, Samuel Smith and others;" and it was stipulated in the condition of the bond, that the same was to be void, "should the said Miles Whitfield pay, to said *plaintiffs* in execution, all damages which the Jury, on the trial of the right of property, may assess against him, in case it should appear that said claim was made for the purpose of delay."

When the levy and claim were returned to the said Superior Court, an issue was made up between the "*plaintiffs* in execution" and the claimant.

At the March Term, 1859, the case came up for trial, when the counsel for the plaintiffs offered in evidence four *fi. fas.*, issued from the Justice's Court of the 92d District, G. M., of Washington County, in favor of Thomas Hardwick, on each of which *fi. fas.* the following entries appeared, to wit:

"No property to be found by me, whereon to levy the within *fi. fa.*; this July 10 h. 1854.

"A. P. FORT, Constable."

"Levied the within *fi. fa.* on the crop, and road-wagon,

Hardwick & Smith vs. Whitfield.

one rockaway, one yoke of oxen, of John D. Paradise ; August 18th, 1854.

"ISHAM ^{his} ~~X~~ WHITE, Constable."
mark.

"Levy on the rockaway, road-wagon and crop dismissed by order of the plaintiff ; August 18th, 1854.

"ISHAM ^{his} ~~X~~ WHITE, Constable."
mark.

"Levied the within *fi. fa.* on one set of gin gear, one yoke of oxen, one rockaway, as the property of John D. Paradise ; this the 21st Sept., 1854.

"A. P. FORT, Constable."

"The gin gear said not to be subject ; the oxen claimed by Allen Jackson ; the rockaway claimed by James Rogers ; this October 7th, 1854, and levy dismissed by order of the plaintiff, 7th Oct., 1857. A. P. FORT, Constable."

"Levied the within *fi. fa.* on four hundred acres, more or less, of land, adjoining Thomas W. Harris, D. G. Moyer, Isaac Tanner and others, property of John D. Paradise ; property pointed out by plaintiff ; this August 8th, 1855.

"A. P. FORT, Constable."

The *fi. fas.* were objected to by counsel for the claimant, on the ground that the entries on them raised a presumption of payment. The presiding Judge sustained the objection, and repelled the *fi. fas.*

Counsel for the plaintiffs in *fi. fa.* then proposed to prove by A. P. Fort, the Constable who made most of the entries, and by William G. Bryan, the presiding Magistrate of the Court from which the *fi. fas.* issued, and at the time they were issued, that no claim, in the form of an affidavit and bond, had ever been made to the property, mentioned in the entries on the *fi. fas.*, as having been claimed by Jackson and Rogers ; and that said levies were dismissed by order of the plaintiff, because it was notorious that the property levied on was not the property of Paradise, but was the property of others who were present, ready to interpose formal claims, in the legal and technical sense of the term ; and to explain

how said levies come to be dismissed, and to show that the dismissal of said levies was not, in law, a satisfaction of the *fi. fas.*

The presiding Judge repelled the testimony, upon the ground that such evidence would permit the witnesses to contradict and falsify the record; that the witnesses were not competent to prove how a claim in the Justice's Court was disposed of, but that there should be a record of the Justice's Court to show that a claim case had been tried by a Jury impanelled for that purpose, or regularly dismissed.

Plaintiffs' counsel then offered in evidence, the *fi. fas.* in favor of Samuel Smith, which were also levied on the land, and on which there was no other entry except a return of "*nulla bona*," by A. P. Fort, Constable, dated 15th May, 1855.

Upon objection being made to said *fi. fas.*, they were repelled by the presiding Judge, on the ground, that the plaintiffs could not proceed with the *fi. fas.* in favor of Smith, under this claim, notwithstanding both plaintiffs were named.

Under these rulings of the presiding Judge, the case was dismissed; whereupon, counsel for the plaintiffs in *fi. fa.* immediately moved to reinstate the case, on the ground, that the Court erred in the various decisions before stated.

The Court overruled the motion, and refused to reinstate the case, and said decisions and rulings are all alleged to be erroneous, and a reversal of the judgment asked.

B. D. EVANS for the plaintiffs in error.

No appearance for the defendant in error.

By the Court—LUMPKIN, J., delivering the opinion.

Was the Court wrong in refusing to allow the plaintiffs in *fi. fa.* to explain by the Magistrate and Constable the entries on the executions?

This being a contest between the judgment creditors and claimant, no explanation was necessary. The entries themselves sufficiently account for the levies. Were the judgment debtor, or a security complaining of being injured by the act of the officer, the case might be different. But it would be a hard rule, and one productive of no compensa-

ting benefit, which will not allow the plaintiff to discontinue a levy, which he is convinced was wrongfully or inadvertently made, and which must result in disappointment and defeat.

The presiding Judge acted upon the supposition, that a levy had been made, and a claim interposed by affidavit and bond, and returned to Court in terms of the Law. Hence, he ruled that to allow the officers to prove to the contrary, would be "to falsify the record." Where is there any *record* evidence of such a proceeding? The entry of the Constable is not a record, so as to import absolute verity. But we are not aware of any principle of Law which forbids a mistake in a record to be corrected. If this were so, how many judgments of this and every other Court, authorizing verdicts, judgments, and all other proceedings of Courts of Record to be amended, were erroneously rendered.

But the fact was, no formal claim was put in. The parties were present, asserting their rights to the property; and the plaintiffs being satisfied that it could not be made subject, directed the levy to be dismissed. And this, the evidence which was rejected was intended to establish.

According to the practice of most of the circuits, Smith's *ex. fa.*, to which the objections taken to Hardwick's did not apply, might have proceeded. We understand the rule is different in the Middle District, and, we must say, more conformable to Law. To include all the executions in one claim is convenient, but can hardly be justified upon the analogies of the Law.

JUDGMENT.

Whereupon, it is adjudged by the Court, that the Court below be reversed upon the ground that the Court erred in dismissing the case.

Floyd vs. Wallace.

FLOYD vs. WALLACE.

1. Where the object of a cross-examination is to show bias or interest so as to impeach the witness, great latitude ought to be allowed by the Court, and questions if answered in the affirmative that might tend in that way, is not objectionable.
2. It is competent to put in evidence outside statements of a witness for the purpose of impeaching him, a proper foundation first being laid for their introduction.
3. An order of the Court of Ordinary, granting leave to defendant to sell the timber for which the suit is brought, is admissible as evidence on the trial of the suit.
4. Admissions by the administrator, admissible to charge the assets of intestate in his hands.
5. If a contract be made with one in his individual right, and on his own security, such person is alone liable on that contract, although a partnership existed, that recovered the entire benefit of the contract of which such contracting party was a member.

Complaint, in Burke Superior Court. Tried before Judge HOLT, at the May Term, 1859.

Andrew Floyd brought suit in Burke Superior Court, against Simeon Wallace, as administrator of Isaiah Sapp, deceased, to recover a sum of money alleged to be due to Floyd, from Sapp in his life-time, for one hundred and thirty-three thousand feet of timber, at one dollar and seventy-five cents per thousand feet.

On the trial of the case in the Court below, the following testimony was adduced, to wit:

Evidence for the Plaintiff.

William B. Hargroves testified: That in the year 1854, as the authorized agent of Isaiah Sapp, he made a contract with the plaintiff Andrew Floyd, by which Sapp was to give Floyd one dollar and seventy-five cents per thousand feet, for the timber which Sapp might cut on the land of Floyd, in the county of Scriven; that pursuant to this contract, and after Sapp had been informed of, and ratified the contract, the witness as Sapp's Agent, cut on the said lands of Floyd, one hundred and thirty-three thousand feet of good timber; that

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witness was not Sapp's partner in the timber thus cut; witness hired a negro boy, by the name of Nelson, from one Mr. Ashe, and gave him notes for the hire; Sapp's name was signed to the notes by his son Seaborn, who was directed to sign them by his mother; witness does not know whether Sapp ever ratified the act of his son in signing his name to the notes; witness and Seaborn Sapp were minors at the time; witness carried the boy Nelson with him to aid in cutting the timber; two of Sapp's hands and the boy Nelson cut steadily for about seventeen weeks, and another of Sapp's hands worked one week; witness superintended the timber cutting as Sapp's Agent, and was not his partner.

Henry Hargroves testified: That Sapp wanted him to furnish provisions to William B. Hargrove and the negroes who were cutting timber for him in Scriven County, in 1854; witness asked Sapp who was to be responsible for the contracts of William B. Hargroves in hiring negroes, buying timber, &c., as said William B. Hargroves was a minor, to which Sapp replied, that he Sapp was to pay these contracts; Sapp further told the witness, that he had authorized the said William B. Hargroves to buy timber from Floyd; with these assurances, the witness agreed to, and did furnish provisions as desired by Sapp.

Evidence for the Defendant.

James Oglesby testified: That William B. Hargroves cut timber on Floyd's land in Scriven County, in the year 1854, and told witness that he had a claim on the timber, and repeatedly told him that he, Hargrove and Sapp, were partners in getting the timber; that at the request of Floyd, and in his presence, witness counted and measured the sticks of timber, of which there were 70 or 80 sticks, averaging 800 feet to the stick, and the witness is sure there was no more; the sticks were marked as timber getters mark their timber, and not in the name of Sapp; witness cannot write or read writing; he knows figures but cannot make a calculation; he can tell the number of feet in a stick of timber fifty feet long and twelve inches wide, to-wit: 600 feet; he cannot tell the number of feet in a stick of timber twenty feet long and ten inches wide; witness did not make any calculation of the quantity of timber cut on Floyd's land, but simply judged that the sticks

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averaged about eight hundred feet; witness counted and measured all the sticks, both burnt and unburnt; the timber had been twice burnt before measuring, and some of it was badly burned; Floyd wrote down a memorandum of the measurement; witness lives in Scriven county, and was sent for or brought to Court by the defendant, who is to pay his expenses, and pay him for his time, the amount not agreed on.

Counsel for the plaintiff then proposed to prove by one Henry Hargrove, that after Sapp's death, the timber cut in Scriven county, was advertized for sale by Wallace as administrator; that Wallace in passing from Burke to Scriven county, said he had obtained an order from the Ordinary to sell the timber, and was then going down to sell it, and that as he returned, again, he told said Henry Hargroves that he had sold it.

Upon objection being made to this testimony, the Court excluded the same, on the ground that neither the acts or sayings of Wallace, as administrator, could bind the estate of Sapp.

Counsel for the plaintiff also offered in evidence, a certified copy of an order from the Court of Ordinary of Burke county, in the following words, that is to say:

"Upon the application of Simeon Wallace, administrator, *pendente lite*, of Isaac Sapp, deceased, and by consent: It is ordered that he have leave to sell the stock of sheep belonging to said estate; certain timber in Scriven county; and that he have leave to hire out the negro men slaves, such as he may deem to the interest of said estate.

"May Term, 1855."

Upon objection made, this order was also excluded by the Court, on the ground that the acts of Wallace could not bind Sapp's estate.

The case being submitted to the Jury, they returned a verdict in favor of the defendant.

Counsel for the plaintiff then moved for a new trial of said case on the grounds following, that is to say:

1st. Because the Court erred in permitting defendant's counsel to ask William B. Hargroves, one of plaintiff's witnesses, on cross-examination, and for the purpose of impeaching him, "if he did not tell one James Oglesby, of Scriven county, that he (Hargroves,) had hired a negro man named

Nelson, from Ashe, for the year 1854, for the purpose of cutting timber?" Counsel for the plaintiff objecting to such a question, on the ground that the statement, if made, was irrelevant.

2d. Because the Court erred in permitting defendant's counsel, in the cross-examination of the said William B. Hargroves, to ask him, "if he did not hire said negro from Ashe, and give his note with Isaiah Sapp as security for the hire; and if he was not sued on said notes, and judgment obtained, *fi. fas.* issued against him and Sapp?" (the notes and *fi. fas.* being exhibited to the witness.) Counsel for plaintiff objecting to the evidence, on the ground that the same was irrelevant and improper, with a view to impeach the witness; and on the further ground, that it did not appear that these facts were known to plaintiff either before or after the sale of the timber to Sapp.

3d. Because the Court erred in permitting counsel to introduce as evidence, the sayings of William B. Hargroves to Oglesby "about his partnership with Sapp in the purchase of, and cutting the timber." Counsel for plaintiff objecting to such sayings on the ground that they were not legal evidence against the plaintiff.

4th. Because the Court erred in repelling the order of the Court of Ordinary, and the acts and sayings of defendant offered by plaintiff's counsel as herein before stated.

5th. Because the verdict is contrary to Law.

6th. Because the verdict is decidedly against the weight of evidence.

7th. Because the Court erred in charging the Jury, "that if they believed that Hargroves and Sapp were partners in cutting the timber, the plaintiff could not recover."

At the November Term, 1860, the presiding Judge overruled the motion and refused the New Trial, which refusal is the error complained of.

JONES & STURGIS, for plaintiff in error.

BENNETT, by JACKSON, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

1. The object of the questions propounded to the witness,

Hargroves, by counsel for defendant, the objections to which form the first and second grounds of the motion for New Trial, was to elicit facts that would show the bias or interest of the witness against the defendant, or in favor of the plaintiff, and thus to disqualify or discredit the witness before the Jury; for this purpose, great latitude ought to be allowed by the Court, especially as, after every thing is out, it is for the Jury to believe the witness or not, as they may be convinced, and as the answers, if in the affirmative, might have a tendency in that way, we cannot say they were improperly allowed.

2. Although it was not competent to use the statements of the witness, Hargrove, as original evidence against the right of plaintiff to recover, still it was competent to put those statements in evidence for the purpose of impeaching the plaintiff's witness, Hargroves; a proper foundation first having been laid for the introduction of such declarations.

3. The order of the Court of Ordinary of Burke County, authorizing defendant as administrator of Isaiah Sapp, deceased, to sell the timber in Scriven County, cut by intestate in his life-time, from the land of plaintiff, ought to have been admitted by the Court as evidence, for it served two purposes, First, to show that the estate of intestate received the benefit of the timber, which was the foundation of the suit. Secondly, it would have a tendency to negative a partnership between the intestate and the witness, Hargrove, in the timber. If such a partnership existed, Hargrove, as survivor, would have been entitled to the timber, for the purpose of paying debts, &c. Hence the exclusion by the Court of that order was error.

4. The acts and admissions of the administrator ought to have been admitted by the Court as evidence against him in favor of the plaintiff. See *Sample vs. Lipscomb*, 18 Geo. 678; *Griffin vs. Inferior Court*, 17 Geo. 96; *Lawson vs. Powell*, decided at this Term.

5. If it is true, as testified by William B. Hargrove and Henry Hargrove, that this timber was cut on the land of the plaintiff, upon the special contract with the plaintiff, that defendant's intestate would pay him, the plaintiff, for it, at the price agreed upon; then the plaintiff is entitled to recover of the defendant, whether there was a partnership between Sapp, the intestate, and Hargroves, the witness, in the timber or not, for that is the contract, and to hold otherwise is to vary the

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contract without the assent of Sapp or the plaintiff. The rule on this subject, as well settled is this: if a credit is given to one member of a firm on his own security only, it does not become a partnership debt, although the partnership received the full benefit of the transaction. *Buckner vs. Lee*, 8 Geo. 292; *Logan vs. Bond*, 13 Geo. 176; *Story on Part.* § 139; *Welker vs. Wallace*, decided at Atlanta, Sept. Term, 1860. It follows that the charge of the Court to the Jury, as stated in the seventh ground of the motion for a New Trial, that "if they believed Hargroves and Sapp were partners in cutting timber, plaintiff could not recover," as applied to the facts of this case, was erroneous. A new trial must be allowed on the fourth and seventh grounds of the motion.

JUDGMENT.

Whereupon it is adjudged by the Court, that the judgment of the Court below be reversed on the ground: 1. In excluding from the Jury the Order of the Court of Ordinary, granting leave to defendant to sell certain cut timber, in Scriven County, and the acts and admissions of defendant, that he was going to, and had sold the timber. 2. In charging the Jury, as the law of this case, "that if they believed Hargrove and Sapp were partners in cutting the timber, the plaintiff could not recover."

The Court should have charged the Jury, upon the facts of this case, "that if the contract was made with the intestate Sapp, and the credit extended to him by plaintiff, and not to the firm, that then the estate of Sapp was alone liable for this debt, notwithstanding there might have been a partnership between Hargrove and Sapp in this timber."

WATSON vs. WARNOCK.

1. A person dying Intestate, and leaving, as his sole heir at law, an infant child, no collateral relative of that child has a legal right, by reason of such relationship, to administration on the Estate of the intestate. The legal right is in the infant.
2. In a contest for administration in such a case between two collateral kinsmen of the infant, before the Superior Court, on appeal from the Ordinary, a judgment of the Superior Court between the same parties in a contest for the guardianship of the infant, awarding the guardianship to one of them, is admissible as evidence, to aid the Jury in the proper exercise of their discretion, and it is not error in the Court to charge the Jury, that they should consider that judgment in making their verdict.
3. Such a record being offered in evidence, it is not error in the Court to refuse an application of counsel objecting to its admission, to suspend the cause on trial, and allow him time to except to the judgment offered in evidence, and obtain a *supercedas*, with a view to its exclusion as evidence.
4. Whether, in such a case, the granting of a *supercedas* would render the judgment superceded, inadmissible as evidence? Query.

Application for Letters of Administration in Burke Superior Court. Tried before his Honor Judge HOLT, at the November Term, 1860.

Everett Tindall, of the county of Burke, died intestate, and Simeon Warnock applied for letters of administration on his estate.

To this application a *caveat* was filed by Green G. Watson, on the grounds following, that is to say:

1st. Because the applicant has no interest whatever in said estate, nor is he the next heir to the deceased.

2d. Because the caveator has an interest in said estate, and an interest in behalf of his children—the caveator being the maternal uncle of Martha Lourania Tindall, the only child of the deceased.

3d. Because said applicant is not a fit and proper person for said administration, from want of ability, on account of ignorance to conduct said administration.

4th. Because said applicant is a creditor of said estate.

Upon the trial of the issue in the Court of Ordinary, said Court gave judgment in favor of Simeon Warnock, and passed an order appointing him administrator of said deceased.

From this judgment the caveator entered an appeal to the Superior Court of Burke County.

Upon the trial of said case on the appeal, the applicant, Warnock, offered in evidence the original papers of file in said Superior Court, in a case between the same parties, being a contest for the Guardianship of Martha Lourania Tindall, a minor child of the deceased, which papers showed the fact that a judgment was rendered in said contest as follows, to wit: "Whereupon, it is considered that the applicant, Simeon Warnock, be appointed Guardian of the said Martha Lourania Tindall; that the Ordinary do issue letters of guardianship accordingly, and that the applicant do recover of the caveator the sum of dollars, costs of this proceeding, and defendant in mercy," &c. The papers also showed that the said judgment was rendered at the May Term, 1860, of said Superior Court, and that a motion for a new trial had been made, which motion had not been disposed of until the 22d day of November, 1860, when the presiding Judge rendered his decision thereon, overruling the motion and refusing the new trial.

Counsel for the caveator objected to this testimony on the grounds:

1st. Because there was no final order or judgment of the Court of Ordinary in said case, said Court of Ordinary being the Court of original jurisdiction.

2d. Because the testimony was irrelevant.

The objection was overruled and the testimony, to which the caveator excepted.

Counsel for caveator then stated to the Court, that he was preparing a bill of exceptions to the decision of the Court, refusing said new trial; that he designed superseding said judgment by bond and security, according to Law, and thus avoid the effect of said judgment as evidence against the caveator; that it would require but a short time to complete the bill of exceptions, and asked the Court to give him time to finish and tender said bill of exceptions.

This request was refused, and the caveator excepted.

The evidence on the trial further showed: That Warnock was the cousin of deceased, and that Watson was the brother-in-law of the deceased, and the uncle of the said Martha Lourania Tindall; that said Martha Lourania was the only child left by deceased, and that he left no wife, no parents, brother or sister, surviving him.

The presiding Judge charged the Jury: "That if the foregoing were the facts of the case, neither party had a legal right to the administration, and that the appointment was very much in the discretion of the Jury; that in determining who should have the administration, the Jury might consider the fiduciary relation of Warnock to the minor, in whom, if of age, the legal right to the administration would vest, as a fact to influence their decision."

To this charge the caveator excepted.

The Jury rendered a verdict in favor of the applicant, Warnock.

The decisions of the Court, admitting the papers touching the contest for the guardianship in evidence, and refusing to allow time to complete and tender the bill of exceptions, and giving the charge aforesaid, are the errors complained of in this case.

JOHN K. JACKSON, for the plaintiff in error.

JONES & STURGIS; SHEWMAKE, for defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

The exception to the judgment of the Court below, admitting in evidence a record of the Court, in a contest for the guardianship of the sole heir of intestate, (a minor,) between the same parties, showing that the guardianship had been awarded to defendant in error, will be postponed to the consideration of the exception to the charge of the Court.

This charge contains two legal propositions: 1st. That neither party had a legal right to the administration, and that the grant of it rested very much in the discretion of the Jury. 2d. That "in determining who of the two should have the administration, the Jury might consider the fiduciary relation of the defendant in error (as guardian) to the minor, in whom, if of age, the legal right to the administration would vest, as a fact to influence their decision."

The plaintiff in error caveated the application of the defendant upon the ground, (among others,) that the applicant had no interest in the estate, and that the caveator had an interest therein, and an interest in behalf of his children—"caveator being the maternal uncle of Martha Lourania

Tindall, the only child of deceased." This averment shows that the entire interest in the estate of the intestate, (beyond that of creditors, who are wholly without this issue,) is in Martha L. Tindall. The interest set up by caveator for himself, and in behalf of his children, is an interest in the estate of Martha L. Tindall, as *her* heirs presumptive. But this is not the interest to which the Law looks, in determining who is entitled to the administration of an intestate's estate. It looks only to interest in *that* estate. The language of our Statute is: "The same rules shall obtain in granting administration on intestate's estates, as were before mentioned for the distribution thereof." *Cobb's Digest*, 305.

This rule entitles the next of kin to the administration. Where there is (as in this case) but one such, that one is entitled to the administration. The first proposition of the Court, therefore, was correct.

This Court, in the case of *Scranton and others vs. Demere*, 6th Geo., 100, in considering the question whether administration might be granted on the estate of a free person of color, and to whom granted, holds this language: "We place them on the same footing with infants in regard to administration. If an infant be next of kindred to the deceased intestate, and thus entitled to the administration, it will be granted to his guardian, *durante minore ætate*"—citing *1st Williams Ex'ors*, 295. Although this question did not come directly before the Court, in that case, the dictum quoted can hardly be considered *obiter*: first, because upon it the Court's judgment was made to turn; secondly, the dictum itself is fortified by authority cited. If this be Law, and we think it is, at least to the extent of making a *prima facie* case in favor of the guardian, there was no error in the second proposition embraced in the charge.

The exception to the ruling of the Court, admitting the record evidence of a grant of guardianship to the applicant for administrator, is based upon two grounds: First, that it was irrelevant to the issue; secondly, that the record showed no judgment of the Court of original jurisdiction, which Court, alone, could grant letters of guardianship.

Our ruling upon the charge of the Court, disposes of the first ground taken in support of this exception.

If the Jury were correctly charged, that in determining

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to whom they would grant administration, they might consider the relation of guardian and ward existing between the applicant and the sole and infant heir of the Intestate, evidence showing that such relation *did* exist, was certainly relevant to the issue.

The record offered and received in evidence, showed a case initiated in the Court of Ordinary, the judgment of that Court, an appeal therefrom to the Superior Court, and the judgment of the latter, awarding guardianship to the applicant for administration, in the case then before the Court. It is true, that the Superior Court had only appellate jurisdiction in the case presented by the record; and it is equally true, that, as an appellate tribunal, it could not issue letters of guardianship to the successful contestant. But upon the sole question involved, viz: to whom guardianship should be granted? the judgment of the Superior Court was conclusive. That Court had the power to issue its mandate to the Court of Ordinary, to confer the guardianship upon Warnock, (the present plaintiff in error,) and to compel obedience to that mandate. *Findlay, Admr, &c. vs. Whitmire et al.*, 15 Geo., 334.

For many purposes, this judgment of the Superior Court would not have availed the plaintiff in error, as e. g. where it became necessary to sustain a right of action as guardian. In such and like cases, he must go further and put in evidence, or make proof of his letters of guardianship. But in a contest between A. and B. for the administration of the estate of an intestate, whose sole heir was an infant, a record, showing the judgment of a Court of final jurisdiction, in a contest between the same parties for the guardianship of that infant, is evidence, because *it establishes a right*, the existence of which is a circumstance proper for the consideration of the Jury, in the case on trial. The only remaining exception is, to the refusal of the Court to suspend the case on trial, and allow counsel for the caveator time to file a bill of exceptions to a decision of the Court previously rendered, overruling a motion for a new trial, *in the case* (the contest for guardianship) *the record of which was then offered as evidence* in this case—counsel stating that it was their intention to file such bill of exceptions, and to give bond and security, in terms of the Law, and thus supercede and avoid the effect of the judgment so offered in evidence.

Either the filing of a bill of exceptions, and giving bond and security, as proposed, would have subtracted from the record in question its quality of legal evidence, or it would not.

If it would, how stands the question? Here was a record offered as evidence to a Jury in a cause *submitted to them, and in progress*, which is determined to be legal evidence; but the Court is asked to suspend the cause actually on trial, and entertain an application to avoid, or vacate, the judgment rendered in another cause, for the avowed purpose of excluding it as evidence in the particular case before the Court. If there be either reason or precedent for such a practice, neither is known to us.

If the *supercedeas* proposed to be obtained would not have divested the record in question of its quality as evidence, there would be, if possible, less reason to grant the motion. We incline to think that would not have been the effect of the *supercedeas*. We think the filing of a bill of exceptions to a judgment of the Superior Court, suspends further progress *in that cause*, until the judgment of this Court; it does not vacate the suspended judgment. That can only be done by judgment of this Court upon the bill of exceptions. But we do not decide this point. We affirm the judgment of the Court below.

JUDGMENT.

Whereupon, it is adjudged by the Court, that the judgment of the Court below be affirmed.

D'ANTIGNAC vs. THE CITY COUNCIL OF AUGUSTA.

1. In *ex parte* proceeding, under special authority, great strictness is required.
2. In proceedings under Statute authority, whereby a man may be deprived of his property, the Statute must be strictly pursued. Compliance with all its prerequisites must be shown.
3. Under an Ordinance of a municipal corporation, providing for the collection of taxes, in the following words: "It shall be the duty of the collector and treasurer to give notice, in one or more of the Gazettes of the city, and to call at least once at the house of each person taxed, to demand the taxes; and unless said taxes be paid within two months from the date of said notice, it shall be his duty to make a return of such defaulters to the City Council, and thereupon executions shall issue against the goods or persons of such defaulters." And further: "At the regular time for returning defaulters on the Digest, the collector and treasurer shall become liable for the amount of the Digest, after deducting the sum for which defaulters are liable; and he shall be liable for the amount of all executions, not satisfied, which may remain in his hands, at the expiration of his term of service, unless he shall within ten days thereafter deliver them to the Clerk of Council." *Held*, that a call at the house of the tax-payer to demand his taxes, and a return of him as a defaulter, are prerequisites to the issue of execution; and that the former must be made within two months after notice in the Gazette, and the latter within the said collector's term of office, to authorize the issue of execution as provided in the Ordinance.

In Equity, and motion to dissolve injunction in Richmond Superior Court. Decided by Judge HOLT at the October adjourned Term, 1860.

William M. D'Antignac exhibited his bill in Equity against the City Council of Augusta, and Foster Blodget, in which the following charges and allegations of fact are embodied, that is to say:

In the year 1843, a business partnership which had before that time existed between the complainant and one John Hill, was dissolved; and the settlement then had of the business of said partnership, showed an indebtedness, by Hill, to the complainant, of about eight thousand dollars. Hill being wholly unable to cancel said indebtedness, the complainant had to grant him indulgence, with the hope that, in after years, Hill could and would pay it off in small

sums. Hill was elected Treasurer and Collector of Taxes of the city of Augusta, by the City Council, which office yielded a considerable profit and salary to the incumbent. Hill agreed with complainant, that he would, out of his salary, pay the taxes due by the complainant to said city, so long as he held said office. Pursuant to said agreement and contract, and in fulfillment of the same, Hill did settle and pay the taxes due by the complainant to said city, for the years 1846, 1847, 1848 and 1849, of which he gave the complainant a written certificate, which is made an exhibit to the bill. Upon application for a similar certificate of the payment of the taxes due for subsequent years, Hill assured the complainant that he had made, or would make, arrangement to pay and account for such taxes, and would at a future time furnish the certificate, which assurance led to a postponement, from time to time, of the obtainment of any written evidence of the payment of such taxes, until Hill died without giving it. The following are copies of certain Sections of the general Ordinance of the city of Augusta, which were in force during the years 1850, 1851, 1852, 1853, 1854, 1855 and 1856, to wit:

Sec. 103. There shall be an officer known as the Collector and Treasurer of the city of Augusta, who shall be elected by the City Council, by ballot, on the second Saturday in January, or at the first meeting thereafter, in every year, who shall hold his office until his successor is appointed and qualified, unless sooner removed by Council, and who shall be allowed such salary as the City Council may agree on, as a full compensation for his services; except such fees as are hereinafter particularly mentioned. He shall give bond with two or more approved securities, for the faithful discharge of his duties, in the sum of twenty thousand dollars.

Sec. 104. The Collector and Treasurer shall receive all moneys collected by the other officers of Council on account of the corporation, and shall pay all demands by order of Council, and keep a regular account of all moneys by him received and paid, which account shall be presented to Council at their monthly meetings. All moneys received by him on account of the corporation, shall be immediately deposited in one of the banks of this city, in the name of the City Council, and he shall, at every regular meeting of Council, and at all times when required by the same, exhibit his

bank-book settled up to the preceding day. No money belonging to the City Council shall be drawn from the bank, except by a check, signed by the Collector and Treasurer.

Sec. 105. The Collector and Treasurer shall collect all taxes due to the city, unless the collection thereof is otherwise provided for. It shall be the duty of said Collector and Treasurer to give notice, in one or more of the gazettes of the city, and to call at least once at the house of each person taxed, to demand the taxes, and unless said taxes be paid within two months from the date of said notice, it shall be his duty to make a return of such defaulters to the City Council, and thereupon executions shall issue against the goods or person of such defaulters, for the amount of his, her or their taxes, with the addition of ten per cent. The Collector and Treasurer shall, at all times, have the privilege of obtaining executions against any individual or individuals, when he has good reason to believe that such person or persons are about to leave the city, and there is danger of losing the whole or some part of the taxes due by such person or person.

Sec. 107. At the regular time for returning defaulters on the digest, the Collector and Treasurer shall become liable for the amount of the digest, after deducting the same for which defaulters are returned, and he shall become liable for the amount of all executions issued at the expiration of the period in which, by regular course of Law, they might have been satisfied, unless he show sufficient cause why satisfaction has not been obtained; and he shall be liable for the amount of all executions not satisfied, which may remain in his hands at the expiration of his term of service, unless he shall within ten days thereafter deliver them to the city council.

Sec. 108. Whenever it shall appear that the Collector and Treasurer has received money on account of the corporation, or has become liable for it under this Ordinance, if he does not within ten days, deposit the same in bank, or pay it to his successor, as the case may require, an execution shall issue immediately for such sums against him and his securities. In case the Collector and Treasurer shall fail to make a settlement, and pay over the moneys by him collected, according to the provisions of this Ordinance, the Mayor, or Chairman of Council, if the Mayor be absent, shall order

execution to issue against him and his securities for the amount which he is in arrears, directed to the Marshal of said city, who is hereby required to levy the same immediately on so much of the goods and chattels, lands and tenements of such Collector and Treasurer, and his securities, as shall be sufficient to discharge the said arrearages and costs, giving such notice of the sale thereof as the Laws of the State require of Sheriffs taking property under execution in similar cases, and shall be allowed the same fees for services performed by him under this Ordinance as are allowed to Sheriffs for similar services.

The following are copies of certain sections of the general Ordinance of the city of Augusta, which were of force during the years 1857, 1858 and 1859, to wit:

Sec. 109. Is similar to Section 103, hereinbefore set forth.

Sec. 110. Is similar to Section 104, hereinbefore set forth.

Sec. 111. The Collector and Treasurer shall collect all taxes due to the city, unless the collection thereof is otherwise provided for. It shall be the duty of the said Collector and Treasurer to give notice in one or more of the Gazettes of this city, and all persons liable for city taxes shall be required personally, or by agent, to pay the same at his office, and unless said taxes are paid within two months from the date of said notice, it shall be his duty to make return of such defaulters to the City Council, and thereupon executions shall issue against the goods or person of such defaulters, for the amount of their taxes, with ten per cent. The Collector and Treasurer shall at all times have the privilege of obtaining executions against any individual or individuals, when he has good reason to believe that such person or persons are about to leave the city, and there is danger of losing the whole or some part of the taxes due by such person or persons. The Collector and Treasurer shall be required to attend at his office daily, (except Sundays,) from 9 o'clock, A. M., until 1 o'clock, P. M., for thirty consecutive days from the date of his advertisement in the city papers, giving notice that the digests of the city taxes for the current year have been completed, and turned over to him for collection. After that time, his regular office hours shall be from 9 o'clock, A. M., to 1 o'clock, P. M., (except Sundays.) Whenever payment of any such taxes shall be made by any person or persons within thirty days after date of said no-

tice, the amount charged against him or them on the digest shall be reduced three per cent.

Sec. 113. Is similar to Section 107, hereinbefore set forth.

Sec. 114. Is similar to Section 108, hereinbefore set forth.

Notwithstanding the stringent requisitions contained in said Sections of the general Ordinance of the city of Augusta, no taxes were ever demanded from the complainant during the years aforesaid, nor was he returned as a defaulter during either of those years; nor did any execution issue against Hill and his securities, for his failure to collect said taxes, due from the complainant to said city. The Chairmen of the Committee on Finance, who were members of said City Council, and whose especial duty it was to examine and report upon the books and accounts of the Treasurer and Collector, had been informed of the arrangement and contract between the said Hill and complainant, and had allowed the accounts of the said Hill to pass without objection on that account, and without requiring any demand to be made upon the complainant for his taxes, or any proceedings to be instituted for the collection of such taxes, as, by the Ordinance of said city, they were required to do, if they deemed the complainant a defaulter. The said Hill was elected and re-elected to said office, during the years aforesaid, and was not removed by said City Council, during said years, for any default or failure of his with reference to the taxes due to said city from the complainant. In view of all the foregoing facts, and of the course pursued by the said Council towards the said Hill, and toward the complainant, and in view of the rigid accountability imposed by the said Ordinance on the Collector and Treasurer, the complainant believed, and had a right to believe, that the City Council were aware of the contract aforesaid between said Hill and the complainant, and that said Council acquiesced in the same, and were willing to look to said Hill for the payment of the taxes due by complainant to said city, inasmuch as no proceedings were ever taken by the Council, either against said Hill or complainant for a failure to collect or pay such taxes. Thus believing, the complainant rested easy, and took no steps to secure his claim against Hill, or obtain a receipt for his taxes, or to see that the books of the Collector and Treasurer showed that they were paid, as he might and would have done under other circumstances. But now,

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at this late day, the complainant finds himself disappointed in his said reasonable belief and expectation, and, since the death of said Hill, is informed that there are no entries on his books showing any payment by him of the complainant's taxes, since the year 1849, and said City Council has instructed and directed Edward Bustin, Esq., the present Collector and Treasurer of said city, to issue executions against the complainant for the same, which instructions the said Bustin has obeyed, by issuing against the complainant ten executions for his taxes for each of the years, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, and 1859, with ten per cent. damages for failing to pay the same at the time prescribed by the 111th Section of the general Ordinance of the city hereinbefore set forth. The aggregate sum of the taxes and damages for which said executions issued, amounts to more than twenty-six hundred dollars. Although the said executions purport to have been issued for the taxes due for the years to which they respectively relate, yet they were all issued on, and bear date, the 14th of February, 1860, and on the 21st day of the same month and year, said executions were levied by said Bustin, Collector and Treasurer, on a house and lot of the complainant, in the city of Augusta. The executions, with the levy entered thereon, are all annexed to the bill as exhibits. Bustin threatens to, and, as complainant alleges, will, proceed to sell said house and lot, unless arrested in his course by the interposition of a Court of Chancery. Inasmuch as the provisions of said city Ordinance have not been pursued, nor their prescribed requisites complied with, by a demand of said taxes from complainant, and a return of him to the Council as a defaulter, he alleges that the *fi. fas.* are proceeding against him contrary to good conscience and equity. Foster Blodget is now Mayor of the city of Augusta, and a member of the City Council, and has a knowledge, or belief founded on facts, which are material to the case made by the bill, and of the circumstances alleged therein, and complainant claims his answer under oath, as to the truth of the facts so alleged, and as to who are the agents, officers and members of said corporation, inasmuch as he has combined and confederated with the City Council to injure the complainant in the premises.

Complainant prays by his bill that a *subpœna* issue, to

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compel the City Council and Foster Blodget to answer the bill and discover the facts; also, that an injunction issue to restrain the collection of the tax *fi. fas.*, and that he have such other relief as his case calls for.

On the 7th of April, 1860, the injunction was granted, as prayed for by the bill.

The City Council of Augusta filed their answer to the bill, in which they admit a belief that a business partnership existed between Hill and complainant, and that it terminated about the time stated in the bill, but as to how the accounts stood between them, or whether Hill owed complainant a large or any balance, they know nothing; that Hill was insolvent, and so continued to the time of his death; that he was elected Collector and Treasurer which yielded a profit and salary as stated; they know nothing of the agreement for Hill to pay complainant's taxes, as charged in the bill, or of his having in good faith paid such taxes up to 1849, in fulfillment of the agreement; they know nothing of the certificate of payment being furnished to complainant, nor of Hill's assurance that other certificates of payment should be given; all they know on that subject is: that up to 1850 complainant's taxes were paid, but how, by whom, and under what arrangement they were paid, the defendants do not know, as the fact that they were paid was the only matter that concerned them; the defendants admit that the Ordinance of city of Augusta are correctly set forth in the bill; they do not know whether Hill ever demanded from complainant the taxes he was due to the city of Augusta, and they do not believe that Hill ever reported or returned complainant as a defaulter; for if such had been done, the defendants would have proceeded to enforce the collection of the taxes. No proceedings were ever instituted against Hill and his securities, for his failure to pay or collect the taxes of complainant; the defendants admit that Foster Blodget and Benjamin Conley, who were Chairmen of the Finance Committee of the City Council, were told by Hill that he had agreed to pay complainant's taxes, but information of the fact was never communicated to the City Council, nor did the Council assent to, or acquiesce in, such agreement or arrangement; the defendants controvert complainant's right to assume or believe that they knew of the alleged arrangement between him and Hill, and that the City Council acquiesced

in such arrangement, and were looking to Hill instead of complainant for his city taxes; they insist, that if all the allegations in complainant's bill were true, (but which they do not admit,) it was his duty to see to it that Hill paid the taxes, as, by the alleged arrangement, Hill was but his agent, and if his own agent proved faithless to the trust reposed in him, it neither furnishes a cause of complaint against the defendant, or any good reason why complainant should be relieved from the payment of taxes which he owes the city, and which have never been paid; the defendants deny that no demand was made upon complainant for his taxes before said executions were issued, but aver that a demand was formally, and in strict compliance with said Ordinance, made by the said Edward Bustin, Collector and Treasurer of said city, upon said complainant for said taxes, and that upon failure to pay the same, he was presented and returned by said Bustin, to said City Council, as a defaulter; that upon said demand upon the complainant, his failure to pay the taxes, and his being returned as a defaulter, and not before, the proceedings against him were instituted and the *fi. fas.* issued; the defendants admit that the *fi. fas.* were issued, dated and levied at the time and in the manner set forth in the bill, and that the collection of the sums due in said *fi. fas.* would have been enforced but for the injunction issued in obedience to the prayer of the bill.

Foster Blodget also filed his answer to the bill, which is substantially the same as that of the City Council, with the following additions, to wit: That he believes no execution was ever issued against complainant until after the death of Hill; that he is Mayor of the city of Augusta, a citizen of said city, and a member of said corporation; that since Hill's death he has been informed by complainant, and believes it to be true, that Hill at some time did say to complainant, that he was growing so rich, that it would keep him [Hill] poor all his life to pay complainant's taxes; that in the summer of 1858, Hill did inform defendant, that when the partnership between him and complainant was dissolved, that he owed complainant a large amount of money which he had no means of paying, and that he had made an arrangement with complainant to pay his taxes for him; the defendant was Chairman of the Committee on Finance at the time; the defendant also believes, from the information

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of said Hill and Benjamin Conley, that Hill made the same statement to Conley, while he [Conley] was either Mayor, or Chairman of the Committee on Finance, but at what time, or under what circumstances, the defendant does not know; he does not know whether this information was ever given to any other member or officer of the Council; he believes, that owing to this arrangement for Hill to pay complainant's taxes, the said Hill failed to demand the taxes from complainant, or to report him as a defaulter; and he also believes, that but for such arrangement, which he believed existed, that the said Chairman of the Committee on Finance would have taken steps to enforce the liability of said Hill for said taxes, under the Ordinance of said city.

Upon the coming in of the answers, counsel for the defendants moved to dissolve the injunction, on the grounds:

1st. That there is no equity in the bill.

2d. That if there be any equity in the bill, the facts and circumstances upon which it is based, are fully denied by the answers of the defendants.

The presiding Judge sustained this motion, and dissolved the injunction, and this decision is complained of as error.

EBENEZER STARNES, for the plaintiff in error.

JOHN K. JACKSON, for the defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

We are not called upon in this case to pass upon the validity of the claim which defendants in error are seeking to enforce against plaintiff, nor do we intend so to do. It appears from the record, that defendants in error, (being a municipal corporation, and authorized by their charter to assess against the inhabitants of the city of Augusta, taxes for the support of the municipal government,) on the fourth day of February, 1860, caused ten executions to be issued by their Clerk, against the plaintiff in error, each for the tax due by him for one year, and all covering the ten years from the year 1850 to the year 1859, inclusive. These executions were not issued from a Court of record, to enforce a judgment obtained either at Law or in Equity, in a suit *inter partes*. They were issued by authority of the general

Ordinance of the City Council of Augusta, providing for the collection of taxes by a summary proceeding against defaulters. The proceeding thus authorized is *ex parte* summary, and extraordinary, in-so-far as it departs from the course prescribed by the general law of the land for the collection of debts. The legality of the Ordinance is not questioned; it has been treated as a Statute, both in the pleadings and in the argument. These executions having been levied upon certain property of the defendant, he filed his bill in chancery, alleging that they had not been issued in conformity with the Ordinance in question, and were, therefore, illegal; and praying that the plaintiff be restrained from proceeding further to enforce them. The injunction was granted, in the inception of this case, but was, upon the filing of the answer, on motion, dissolved—the Court below holding that they had been legally issued, and this judgment is assigned as error.

Our first inquiry is into the Law of the case; and this is to be found in those sections of the general Ordinance of City Council of Augusta, which impose upon the inhabitant the duty of paying, and upon the Collector and Treasurer the duty of collecting taxes; and which define the status of a defaulting tax-payer, and authorize the issue of execution against him.

During the years from 1850 to 1856, (both included) the Section governing this case was the 105th, and is in these words: “The Collector and Treasurer shall collect all taxes due to the city, unless the collection thereof is otherwise provided for. It shall be the duty of the Collector and Treasurer to give notice in one or more of the Gazettes of this city, and to call at least once at the house of each person taxed, to demand the taxes, and unless such taxes be paid within three months from the date of said notice, it shall be his duty to make a return of such defaulters to the City Council, and thereupon executions shall issue against the goods or person of such defaulters, for the amount of his, her or their taxes, with the addition of ten per cent,” &c. The remaining portion of this Section is omitted, because it is not pretended that it is applicable to this case.

In the year 1857, upon a revival of the general Ordinance, Section 111 was made to supercede Section 105, above quoted; but those portions of both Sections immediately appli-

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cable to the question under consideration, are identical, with this exception, viz: In framing the 111th Section of the Ordinance of 1857, the words—"and to call at least once at the house of each person taxed, to demand the taxes"—which are found in the 105th Section of the pre-existing Ordinance, are omitted, and for them the following words are substituted: "And all persons liable for city taxes, shall be required personally, or by agent, to pay the same at his office," [the office of the Collector and Treasurer.]

A new rule was thus introduced, the difference being, that previous to 1857, it was the duty of the Collector and Treasurer to call upon the tax-payer and demand his taxes; whereas, in and after 1857, it was the duty of the tax-payer to call upon the Collector and Treasurer, and make payment without any other demand than the notice in the public Gazette. In view of this change, the executions we are considering arrange themselves into two classes: 1st, those issued for taxes due prior to; and 2d, those issued for taxes due in and after 1857.

Such being the authority given the Collector and Treasurer of the city of Augusta in the premises, we next inquire what is the general or public Law governing the exercise of this authority.

The following propositions may be regarded as Law, settled by repeated adjudications of high authority:

1. That in *ex parte* proceedings of this kind, under special authority, great strictness is required.

2. That in proceedings by Statute authority, whereby a man may be deprived of his property, the Statute must be strictly pursued. Compliance with all its prerequisites must be shown.

Ronkendorf vs. Taylor's Lessee, 4 *Peter's Reports*, 359; *Williams vs. Peyton*, 4 *Wheaton's Reports*, 77; *Bloom vs. Burdick*, 1 *Hill's Reports*, 141, 142; *Thacher vs. Powel*, 6 *Whcaton*, 119; *Jesse vs. Preston*, 5 *Grattau*, 120; *Jackson vs. Shephard*, 7 *Cowen*, 90, 91.

In all of these cases the contest was between a purchaser at a public sale, professedly in pursuance and by authority of Statute Law, and the party whose property was thus sold or his representatives or assigns. In all of them, save *Bloom vs. Burdick*, 1 *Hill*, the sale was for the collection of taxes in arrears.

They are, therefore, directly in point; and the rule of Law recognized in each might, with propriety, if necessary, be more rigidly enforced in the case under consideration, for the reason that the parties here are the Government assessing and seeking to collect taxes, and the inhabitant resisting their collection.

Applying, then, these rules of Law to the Ordinances in question, we proceed to inquire whether the tax executions against the plaintiff in error were legally issued?

By the letter of those Ordinances, execution was authorized to be issued only against *defaulting* tax-payers. They require that payment shall be made to the Collector and Treasurer, but that execution, upon failure to pay, shall be issued by the Clerk of Council. To make this act of the Clerk legal, there are three indispensable prerequisites: 1st, that the Collector shall have made such call upon the tax-payer as the Ordinance prescribes; 2d, that the tax-payer, after such call made, shall have failed within the time designated by the Ordinance to pay; 3d, that the Collector shall have reported the tax-payer thus failing, to the City Council. Anterior to the year 1857, to make the call upon the tax-payer a full compliance with the Ordinance, it was necessary that the Collector publish notice in one or more of the Gazettes of the city, and "*call at least once at the house of each person taxed, to demand the taxes,*" and to the first class of executions this provision is applicable. It is conceded that he did publish notice in a Gazette of the city, but it does not appear that the Collector and Treasurer, in any one of the years from 1850 to 1856, inclusive, did "*call at the house of the plaintiff in error to demand his taxes.*" The complainant in his bill alleges that he did not. The corporation, by attorney, say they have no certain knowledge whether or not he did. Mayor Blodget, answering upon his corporal oath, says he has no certain knowledge, but believes the Collector did not make such call. This being a prerequisite, must appear affirmatively. In *Jackson vs. Shephard, supra*, this precise question was made and so determined. Here there was one prerequisite not complied with.

It is further conceded that the Collector for those years did not, in any one of them, report the plaintiff in error to the City Council, as a defaulter. This is another prerequi-

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site not complied with. The tax-payer, then, not having been in either of those years in a predicament which made him, by the terms of the Ordinance, liable to be reported as a defaulter, and not having been, in point of fact, so reported, the Ordinance conferred no authority on the Clerk to issue executions.

In regard to the second class of executions, those issued severally for the years 1857, 1858, 1859, the prerequisite of a call and demand at the house of the person taxed did not obtain. It had been dispensed with by an amendatory ordinance. But the amendatory ordinance, like the original, requires that he shall have been reported by the Collector to the Council, as a defaulter, and that *then* executions may be issued. It is conceded, that the plaintiff in error was not, in either of the three years last mentioned, so reported. For lack of this prerequisite, *alone*, we hold that the executions for the taxes of those three years were illegally issued.

It is insisted by the defendants in error, that these prerequisites of the ordinances in question were complied with, and the executions legally issued; and so the Court below held. This allegation of the defendants and ruling of the Court rest upon the averment in defendant's answer, that in the year 1860, Hill, who filled the office of Collector and Treasurer during all the years wherein plaintiff in error is alleged to have made default, having died, Edward Bustin, his successor, made demand of plaintiff personally, for the taxes of all those years; and upon his failing to pay, reported him to the City Council as a defaulter, before the executions were issued.

To determine whether or not this was a compliance with the prerequisites of those ordinances, we must look a little more closely into them to ascertain *when* the *demand* under the first, and *when* the report of default under both, must be made. The one hundred and fifth Section, (of force previously to 1857,) after making it the duty of the Collector and Treasurer to publish notice, and to call and demand payment, proceeds in immediate connexion, thus: "And unless said taxes be paid within two months from the date of said notice, it shall be his duty to make return of such defaulters," &c. It is his duty, in cases of default, to do three things, and in this order: To give "*notice*," to make "*demand*," to make "*return*." The tax-payer is entitled to

notice in the Gazette, and to demand at his house, and he is allowed two months within which to pay, not after demand at his house, but after "*notice*" in the Gazette. He is entitled to "*demand*," *before* being placed in default, but he is required to pay within two months after notice in the Gazette; therefore, the demand must be made within two months after notice in the Gazette.

There need be no more distinct limitation of the time within which demand, as a prerequisite to the issue of execution, must be made. No demand was made in any one of the years, anterior to 1857, upon the plaintiff in error, within such time and the after demand in 1860, was no compliance with the ordinance.

Regarding the time within which defaulters in any one year must be returned, there is little, if any, less certainty. Section 107 of the general Ordinance, existing anterior to 1857, and Section 113 of the general Ordinance, as revised and amended in that year, are precisely the same, and, in connection with those Sections already considered, furnish a rule for determining, with sufficient precision, the time within which defaulters must be returned. They are in these words: "At the regular time for returning defaulters on the digest, the Collector and Treasurer shall become liable for the amount of the digest, after deducting the sum for which defaulters are returned, and he shall become liable for the amount of all executions issued at the expiration of the period in which, by regular course of Law, they might have been satisfied, unless he show sufficient cause why satisfaction has not been obtained; and he shall be liable for the amount of all executions not satisfied, which may remain in his hands *at the expiration of his term of service*, unless he shall, *within ten days thereafter*, deliver them to the City Council."

The first words of this Ordinance, viz: "*At the regular time for returning defaulters*," settle conclusively one point in controversy, to-wit: That there *is a regular time* for the making of this return, and it only remains to determine what that time is. By Section 105 of the old, and Section 111 of the present ordinance, it is provided, that "unless said taxes be paid within two months from the date of said notice, (in the Gazette,) it shall be his (the Collector's) duty to make a return of such defaulters to the City Council," &c.

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We think this enjoins the performance of the duty so soon after the expiration of the two months, as, in the regular course of things, it can be done. A reasonable construction would be, that defaulters for the current year should be returned to the Council at their first regular meeting after the expiration of the two months, if sufficient time intervened; if not, then at the next succeeding meeting. But it is not necessary, *in this case*, to place so narrow a limit upon the time. There is a more liberal construction, to which, for the sake of the argument and greater certainty, we resort.

Returning to Section 107 of the old—113 of the present ordinance above quoted—we find it provided, that “he (the Collector) shall be liable for the amount of all executions not satisfied, which may remain in his hands *at the expiration of his term of service* unless he shall within ten days *thereafter* (i. e., after the expiration of his term of service) deliver them to the city council.” Now, the context shows that the executions here spoken of are such as may have been issued against tax-payers making default, during his term of service. They must (to save him from liability) be delivered within ten days after his term of service shall have expired. His term of service is one year, (and until his successor shall be appointed and qualified, see Secs. 103 of the old and 109 of the present ordinance.)

Clearly, then, the ordinance contemplates that execution shall issue against defaulters before the expiration of the term of office of the Collector, within which the default was made; or, in other words, within the same fiscal year (of the corporation) in which default was made. But, by the ordinance, the issue of execution must be preceded by a return of the defaulter, *ergo* such return must be made before the expiration of the Collector's term of office—before the expiration of the fiscal year within which default was made. By the first clause of the Section we are now considering, the measure of the Collector's liability is fixed. It is the amount of the tax digest, less the sums for which defaulters are returned. Will the City Council, the defendants in error, say they intended, by the enactment of this ordinance, to leave themselves, or permit their Collector to leave them, at the expiration of his term of service, without the data necessary to measure, to ascertain his liability? Scarcely,

when, by the next succeeding Section, (108 of the old and 114 of the present ordinance,) they provide that executions shall issue against him and his securities for the amount of his liability, within ten days, unless he shall pay over such amount to his successor, or deposit it in Bank. If they did not so intend, they intended that defaulters in any one year shall be returned before the expiration of the then Collectors' term of service. And so we must construe their ordinance.

This construction is strengthened by consideration of the nature of this corporation, and the object for which it assesses taxes. It is a corporation created for municipal government, and it is permitted to assess and collect taxes annually to defray the annual expenses of that government. It should assess no higher taxes than are necessary for that purpose; and keeping within this rule, there rests upon it both a duty and a necessity, to collect, within the year, the taxes assessed in and for that year.

If we have correctly construed this ordinance, and correctly stated the general law-governing *ex parte* summary, statutory proceedings, (of which this is one,) shall it be said that after ten years of non-action, the defendant in error may cause a demand for taxes to be made, then a return of the tax-payer as a defaulter, then the issue of execution *ex parte* against him, whereby his property may be sold, and his title thereto divested, without a hearing—a day in Court allowed him? We think not. We hold that the defendant in error, by refraining so long from any attempt to enforce payment of these taxes, or to place the tax-payer in the predicament of a defaulter, has lost this summary *ex parte* remedy against him; and must resort to suit at Law or in Equity, as in other cases between debtor and creditor. The judgment of the Court below is therefore reversed.

JUDGMENT.

Whereupon, it is adjudged by the Court, that the judgment of the Court below, dissolving the injunction, be reversed, and the injunction be reinstated, on the ground: That the tax executions exhibited with the bill were illegally issued, the prerequisites of the Ordinance authorizing the issue of tax executions not having been complied with.

Watson vs. Warnock.

WATSON vs. WARNOCK.

1. In Georgia no one has a right to the guardianship of an infant under the age of fourteen years, other than his own; but the power of appointment is vested in the Ordinary, for the benefit of the child.
2. On an appeal from the grant of guardianship, to the Superior Court, the whole case goes up to be tried anew. The discretion given by law to the Ordinary, vests by the appeal in the Superior Court for the purposes of that trial.
3. The question for trial in the Superior Court is one of fitness, for the officers and therefore a proper one to be submitted to the Jury on the proofs.
4. The requests of the parent of the infant, on his death-bed as to the guardianship of the person and property of the child, is a proper circumstance to be considered by the jury, and all other things being equal sufficient to turn the scale

Application for Letters of Guardianship, in Burke Superior Court. Tried before Judge HOLT, at the May Term, 1860.

Simeon Warnock made application to the Court of Ordinary of Burke County, for letters of guardianship of the person and property of Martha Lurania Tindall, a minor child of Everett Tindall, deceased.

To this application, Green G. Watson entered a caveat, on the following grounds:

1st. That the caveator, is the nearest of kin to the said minor child, said minor being the only child of the only sister of the caveator, and that caveator is by blood the maternal uncle of said minor.

2d. That if the applicant, is of any kin to the deceased, Everett Tindall, deceased, it is too remote to give him any interest in the estate of deceased, or in the estate of the said minor.

The trial of the issue made by the application and caveat, was regularly postponed until the October Term, 1858, when the same was tried, in the Court of Ordinary, and said Court rendered the following judgment, to-wit:

"It is ordered by the Court, that Green G. Watson being the maternal uncle, and next of kin of the minor, that the caveat be sustained, and that the said Green G. Watson be, and he is hereby appointed, guardian of said minor, on his

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giving bond with Simeon Wallace and Adam Belcher as his securities in the sum of \$25,000, and that letters of guardianship do issue in terms of the law."

From this judgment, Simeon Warnock entered an appeal to the Superior Court of Burke County, and on the trial of the case on the appeal at the May Term, 1859, the testimony disclosed the following state of facts :

Everett Tindall, deceased, and Simeon Warnock, the applicant were cousins, and the caveator and Tindall's wife, were brother and sister. Mrs. Tindall died before her husband, and all the property of which Tindall died seized, and which now goes to the minor, Martha Lurania Tindall, came through Tindall's family, and that no part of it came through Tindall's wife. Simeon Warnock, the applicant, is a prudent and judicious manager of money and property ; a kind and humane man, and a suitable and proper person to take the charge and management of the person and property of the minor. During his last sickness, and whilst under the apprehension of death, but of sound and disposing mind and memory, Everett Tindall called several persons around his bed-side, and called upon them to bear witness, that it was his will and wish, if he died, that his cousin Simeon Warnock should take charge of his property, pay his debts, and save all he could for his child. Pointing to the child on the bed beside him, and said that the child was all he cared for, and that he wanted Warnock, to take the child home with him, and take care of it, and raise it, and take charge of his property, and manage it for his child.

The Jury returned a verdict in favor of Simeon Warnock, the applicant.

Counsel for the caveator then made a motion for a new trial on the following grounds :

- 1st. Because the verdict is contrary to law.
- 2d. Because the verdict is contrary to evidence.
- 3d. Because the verdict is contrary to law and evidence, and the charge of the Court.

At the November Term, 1860, the presiding Judge pronounced his decision, overruling the motion, and refusing the new trial, and this decision is the error complained of in this case.

JOHN K. JACKSON, for plaintiff in error.

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JONES & STURGIS; SHEWMAKE, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

Simeon Warnock applied to the Court of Ordinary of Burke County, for the guardianship of Martha Lourania Tindall, minor child of Everett Tindall, deceased. Green G. Watson caveated the application, claiming the right himself to the guardianship of the child as next of kin, he being the maternal uncle, while the applicant was only a cousin to the child's deceased father. On the hearing, the Ordinary refused the application of Warnock, and gave the guardianship to Watson, as the next of kin. From this judgment, Warnock appealed to the Superior Court, and on the hearing before a special Jury, the verdict was had in favor of Warnock reversing the judgment of the Ordinary. A motion was made for a new trial by Watson, on the grounds that the verdict was contrary to law and evidence. This motion having been refused, Watson excepts, and that is the case now before us.

1. The Court of Ordinary has the power to grant letters of guardianship for infant children under the age of fourteen years, to any applicant for the same, "or to such other person as in the discretion of the Court may be proper." *Cobb*, 338. The power is given to the Ordinary to be exercised for the benefit of the infant, not the applicant. In Georgia no one can claim the guardianship of a child other than his own, as a right, no matter how nearly related.

2. The Ordinary exercised that power in this case, and under the law, an appeal was taken to the Superior Court. That appeal carried to the Superior Court the whole case to be tried on its merits, without reference to the judgment of the Ordinary. The Superior Court having the same power and discretion for the adjudication and settlement of the question of guardianship in that application by virtue of the appeal, as the Court of Ordinary had.

3. When the case came up for trial, the presiding Judge of that Court viewing the issue between the contestants as one of fitness for the office, rather than of right in the individual, and very properly so submitted the question to the consideration of a special Jury selected for that purpose, to

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be determined upon the proofs submitted by the parties. After hearing the evidence, the Jury returned a verdict which must be a final settlement of the question in issue unless it was so decidedly and strongly against the evidence as to compel this Court to interfere with the discretion vested by law in the tribunal trying this issue. And instead of the verdict being against the evidence, any other than the one rendered, would have been so, most decidedly. All the evidence submitted on this point was, that Warnock, the applicant, was a prudent and judicious manager of property, kind, humane, and a most fit person to take charge of the person and property of the minor. Each of the witnesses examined on this point concur in this evidence and there is nothing in conflict, nor is it pretended that the testimony is not the truth—there is no issue upon it. On the other hand, Watson, the contestant, offers no evidence to show that he is a fit and proper person to receive the guardianship, either of the person or property of the child; but he rests his right exclusively on the ground of his relationship to the infant, and that, as we have stated, amounts to nothing.

4. Add to all this, the dying wishes and earnest requests of the father of the child—which we hold to be a proper circumstance for the consideration of the Court in determining the application, and, all other things being equal, sufficient to turn the scales in favor of the person so designated, and there is no room left for a doubt as to the propriety of the finding.

JUDGMENT.

Whereupon, it is adjudged by the Court, that the Judgment of the Court below be affirmed.

JOHNSON vs. HINES.

1. A husband and father in the possession of slaves, executed an instrument under seal, upon consideration of natural love and affection to his wife for life, and after her death to her children, using these words, "I, B. J. do give, grant and convey." (certain slaves by name.) In the next clause these words occur, "To have and to hold *after my death* the aforesaid property," &c. *Held*, that in the first clause there is a clear gift in presenti; that the words "*after my death*" in the *habendum*, may be construed into a postponement of possession and enjoyment by the donees, until the donor's death, or a reservation of an estate for his life, and thus reconciled with the prior gift in presenti; that if the two clauses conflict, the first must prevail, and that in either view the instrument is a deed and not a testamentary paper.
2. A conveyance from a husband to his wife directly, will be supported in Equity, as against his representative, under circumstances showing the absence of fraud, and a clear intention to settle the property upon her, or upon her and her children, especially if he derived the property through her.

In Equity, in Emanuel Superior Court. Decision on Demurrer made by Judge HOLT, on the 25th of September, 1860.

Mary A. B. Johnson exhibited her bill in Equity against Joseph H. Hines, in which the following charges and allegations are made, to-wit:

Anthony Bonnel, the complainant's father, departed this life, in July, 1825, having by his Will, bequeathed to the complainant a negro girl by the name of Ritt, and a negro boy by the name of Prior, together with some other property; on the 4th day of July, 1837, the complainant inter-married with Littleberry Johnson, who upon such inter-marriage, received said negroes and other property as the sole and separate property of the complainant, and so managed and treated the same; on the 14th October, 1843, the said Littleberry Johnson, for the purpose of better securing the legal and equitable interest of the complainant, in said negroes, and in order the more distinctly and formally to set apart said negroes to the complainant, and to preserve and secure to complainant the complete enjoyment thereof, and to convey all right, title and interest, which might have acquired by reason of his inter-marriage with the complainant, made a deed of gift, which was duly proved and recorded, and of which the following is a copy, to wit:

(EXHIBIT A.)

“ STATE OF GEORGIA, EMANUEL COUNTY :

“ To all whom it may concern, I, Berry Johnson, do send greeting: Know ye that I, the said Berry Johnson, of the State and County aforesaid, for the love, good will and affection, which I have for my beloved wife Mary Ann Johnson, do by these presents, freely give unto my beloved wife Mary Ann Johnson, her heirs, executors and administrators, all and singular, two certain negro slaves, one, a girl, about the age of fourteen, by the name of Ritt, the other, a boy, about eleven years old, by the name of Prior, to have and to hold the above described two negro slaves, to her, the said Mary Ann Johnson, her heirs, executors and administrators from henceforth, to be her, and their property without any manner of conditions. In witness whereof, I, the said Berry Johnson, have set my hand and seal, this the 14th day of October, 1843.

“ Signed, sealed and delivered in presence of Washington Williams and William Johnson.

“BERRY JOHNSON,” [L. s.]

Said negro girl Ritt, has given birth to several children, to-wit: Mary, Lewis, Hannah and Fanny. On the 4th day of October, 1848, in order, if possible, more fully to secure said negroes and their increase, to the sole and separate use and enjoyment of the complainant, and to protect the interest and right of the complainant against any claim which might be set up by any person by reason of the marital rights of the said Berry Johnson, he, the said Johnson, executed another deed, which was recorded on the 4th of March, 1854, and of which the following is a copy, to-wit:

(EXHIBIT B.)

“ GEORGIA, EMANUEL COUNTY :

“ This indenture made this the 4th day of October, 1848, between Littleberry Johnson, of said County and State, of the one part, and Mary Ann Johnson, wife of the said Littleberry Johnson, for, and in consideration of the natural love and affection which he has and bears to his said wife Mary

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Ann Johnson, to be at her whole, sole disposal at my death, the following property, to-wit: a negro woman about 22 years old; Prior, or Gabriel, known by either name, a boy about 15 years old; Mary, a negro girl, about one year old, to have and to hold the aforesaid negroes, and their issue or increase, unto the said Mary Ann Johnson for her use and disposal her life-time, and at her death, to belong to her children, together with all, and singular the increase, profit, and issues of said negroes, unto the said Mary Ann Johnson and her children forever in fee simple.

"In testimony whereof, the said Littleberry Johnson hath hereunto set his hand and affixed his seal, the day and year above written.

"Signed, sealed and delivered in presence of George W. Clifton and Stephen Lewis, J. P.

"LITTLEBERRY JOHNSON," [L. s.]

In the year 1849, Anthony W. Bonnell, the brother of the complainant, departed this life in the County of Bulloch, leaving a Will, which was duly proved and admitted to record, in and by which, the said Anthony W. Bonnell bequeathed all his property, both real and personal, to the complainant, her mother, and her brother William Bonnell; it was the intention of the said Anthony W. Bonnell, by his said Will, to create a separate property in the bequest made to the complainant, and to settle the property so bequeathed to complainant upon her, and to her sole and separate use, and the said Littleberry Johnson, well knowing such to be the intention of the said Anthony W. Bonnell, and desiring to carry out his wish in the premises, received the property so bequeathed to the complainant into his possession, so treated and managed the same as the trustee of complainant, there being no clause in the Will providing for a trustee; the property thus received under the Will of the said Anthony W. Bonnell, consisted in part, of a negro boy named Isaac, and a negro girl called Rhody, who afterwards gave birth to four children, to-wit: Leah, Ellen, Ned and Ben: the following is a copy of the Will of Anthony W. Bonnell, to-wit:

(EXHIBIT C.)

"GEORGIA, BULLOCH COUNTY:

"In the name of God, Amen. I, Anthony W. Bonnell, of said County and State, being low of body, but of sound mind

and memory, knowing it is once appointed for all men to die, I commend my soul to God, and my body to the dust, and what it has pleased God to bless me with, so far as regards my worldly effects and small estate, I dispose of as follows: *Item 1.* I give and bequeath unto my beloved mother, and my brother William Bonnell, and Mary Ann Johnson, after paying all my just debts, all of my slaves, to-wit: one negro man named Gabriel; one woman named Mary; one named Rhody; and a boy named Isaac; one girl named Betty; also one bay mare; one two barreled gun. The above named property to be equally divided amongst the three named persons, and not otherwise. And I do appoint James Lee my sole and lawful executor, to this my last Will, and I charge and require him to see that this my will is carried into effect. This the 13th of April, 1849.

"Signed in presence of Malachi Mercer and Andrew Bird.
"A. W. BONNELL."

For the purpose of carrying out the well known wish and intention of the said Anthony W. Bonnell, and for the purpose of securing the property bequeathed to the complainant by the said Anthony W. Bonnell, to her sole and separate use, and for the purpose of protecting said property from any and all claims, which might be set up to said property on account of the marital rights of the said Littleberry Johnson, he, the said Littleberry Johnson, executed a deed, which was duly recorded on the 4th of March, 1854, and of which the following is a copy, to-wit:

(EXHIBIT D.)

"GEORGIA, EMANUEL COUNTY:

"This indenture made the 3rd day of January, 1850, between Berry Johnson of said County and State, of the one part, and his wife Mary Ann Johnson of the same place, of the other part, witnesseth: that the said Berry Johnson, for, and in consideration of the natural love and affection which I have to her, the said Mary Ann Johnson, I, Berry Johnson, do give and grant, and convey, unto the said Mary Ann Johnson, during her natural life, and at her death to belong to her children, or heirs of her body, one negro girl named Rhody, and her increase; also one negro boy named Isaac:

said girl about 10 years old, and said boy being about seven years old ; to have and to hold the aforesaid property at my death, as above stated, unto her, the said Mary Ann Johnson and her children, and heirs of her body, and assigns, together with all and singular, the rights, members, and appurtenances to the same, in any manner belonging to them and their own proper use, benefit and behoof, forever in fee simple.

“ In witness whereof, the said Berry Johnson, hath hereunto set his hand and affixed his seal, the day and year above written.

“ Signed, sealed and delivered in the presence of W. Bonnell and James Lee, J. P.

“ BERRY JOHNSON,” [L. s.]

On the 10th day of April, 1856, the said Littleberry Johnson, the husband of complainant, departed this life intestate, leaving a large and valuable estate, of real and personal property, in his own right, over and above the payment of his debts ; and also leaving the complainant a widow, with eleven children, ten of whom are girls, and who are interested in said negroes, and are entitled to them at the death of complainant, and who are to be supported and educated by complainant. No provision was made in any of said deeds for the appointment of a trustee, nor did any trustee intervene in the treaties and negotiations relative to said property, or in the execution of said deeds, which makes it necessary to resort to a Court of Equity for the enforcement of the complainant's rights. Joseph H. Hines, as the administrator *de bonis non*, of the said Littleberry Johnson, deceased, commenced an action of trover in Emanuel Superior Court against the complainant, for the recovery of said negroes, Prior, Ritt and her children, Mary, Lewis, Hannah and Fanny, also the negro boy Isaac, and the negro girl Rhody and her children, Leah, Ellen, Ned and Ben ; and also the hire of said negroes, which action is now pending in said Court, and that the said Joseph H. Hines is endeavoring to recover said negroes as the property of the estate of the said Littleberry Johnson, deceased, notwithstanding the deeds and Will aforesaid ; and notwithstanding the said Littleberry Johnson, held, treated and managed said negroes as the sole and separate property of the complainant up to the time of his death, and so declared time and again.

The bill prays that Hines may fully answer the charges of the bill; that the action of Trover may be enjoined; and that the deeds may be reformed in every particular in which they are defective, so as to convey, confirm, and vest in complainant the full and absolute property in all of said slaves, and for general relief.

The Injunction was granted as prayed for, on the 2d of September, 1859.

The defendant Hines, set up a demurrer to the bill, on the following grounds, to-wit :

1st. That a Court of Equity has no power to reform the deed set forth in the bill, under the allegations contained therein, there being no charge of fraud, or mistake in the drafting of said deeds at the time they were executed.

2d. That said deeds are void, being in their legal effect Wills, and not deeds, and are not properly probated.

3d. That the bill seeks to set up a parol trust against conveyances absolute on their face, and the trust being voluntary, cannot be enforced, if any thing is to be done to make it valid.

4th. That the Superior Court of Emanuel County has not jurisdiction of the case, because at the time of filing the bill, and from that time to the present, the defendant Hines resided, and still resides, in the county of Burke, and not in the county of Emanuel.

5th. That according to the allegations of the bill, it seeks to set up a contract or agreement relative to slaves, which contract or agreement, nor any note or memorandum of the same was ever reduced to writing and signed by the defendant's intestate, or any other person thereunto by him authorized, and is therefore violative of the Statute of Frauds, as extended to contracts relative to slaves by an Act of the General Assembly passed 28th February, 1856.

It was agreed and admitted by the parties, that Hines resided in Burke County as alleged in the 4th ground of the demurrer, and that Littleberry Johnson was a widower when he married complainant, and that he then had several children by a former wife, which children are still living.

The presiding Judge sustained the demurrer and dismissed the bill, and this decision is the error complained of in this case.

LALLERSTEDT, for plaintiff in error.

SHEWMAKE, for defendant in error.

By the Court.—JENKINS, J., delivering the opinion.

The judgment excepted to sustained the defendant's demurrer to complainant's bill. There is some discrepancy between the transcript of the record and the bill of exceptions, in the statement of the grounds of demurrer; we take them as presented by the bill of exceptions appearing at the close of the Reporter's statement.

There is in the Bill a prayer for reformation of deeds attached as Exhibits A., B. & D.; a prayer that complainant may be confirmed in her legal and equitable title to the slaves in dispute, and a general prayer for relief.


The first and second grounds of demurrer, are directed against so much of the Bill as seeks reformation of the deeds, and the remaining grounds against the general equity set up in it, and the relief sought under it.

The two first grounds are well taken, there being no sufficient averment either of fraud or mistake in the framing or in the execution of the deeds, nor any distinct statement of the reformation sought.

If, however, without any reformation of the deeds, complainant has made a case which entitles her to other relief asked, the Bill should be retained, and defendant required to answer.

We, therefore, consider the other grounds of demurrer. The third ground is, that the papers exhibited are not in legal contemplation deeds, but are testamentary papers, and valueless as muniments of title for want of probate. The Court below sustained this ground, except as to Exhibit A. The view of the Court, as to Exhibits A. & B., treating the former as a deed, and the latter as a testamentary paper, we think was right.

1. We disagree with the learned Judge in ascribing to Exhibit D., the character of a testament and not of a deed. This paper is so far technically framed that it contains a distinct granting clause, and also a *habendum* and *tenendum*. The granting clause, which is the most essential part, is expressed in language which most clearly imports a gift in *pre-*



senti, "I, Berry Johnson, (upon the consideration stated,) do give, grant and convey," &c. And it is a grant or gift of a life-estate to his wife, with remainder to her children. These words import a present, immediate vesting of the title. Doubtless the opinion of the Court below was predicated upon the phraseology used in the *habendum*, "to have and to hold the aforesaid property *at my death*, as above stated," &c.

Now, either these words are consistent with the clearly expressed gift in *presenti* in the granting clause, or they are not. It is the duty of Courts to make them consist, if possible, without doing violence to law. By treating the first clause as a gift in *presenti*, passing the title at the moment of execution, and the second as a postponement of possession and enjoyment of the property, by the donees, until the death of the donor, they are made to consist. It is then the common case of a gift by deed, reserving a life estate in the donor. We see no difficulty in this construction; it is a familiar use of the *habendum* to place limitations upon the estate conveyed by a prior granting clause. In conveyances in trust, where the legal title passes by the granting clause, it is by the *habendum* that the trusts, uses and limitations are declared, and the whole deed is sustained, because the two clauses are reconcilable.

But suppose that, in this case, the two are irreconcilable, which shall prevail? It is a well-settled rule of law, that if there be an irreconcilable conflict between two clauses in a deed, the first shall prevail; it is regarded as first done and complete, and therefore beyond the power of the grantor. It is otherwise in a Will, because, from the nature of the instrument, the *last* expression of testamentary intention must prevail. Had the grantor said, in the first clause, "I give, at my death," or had he used any equivalent words, he would thus have manifested an intention to postpone the vesting of the property, the transfer of the title, until the happening of that event; and it is precisely that intention which impresses upon an instrument, whatever be its form, the testamentary character. But it is otherwise in this instrument.

Thus we arrive at the conclusion, that the instruments set forth, in exhibits A and D, are Deeds, and not Wills; and it appears that they cover all the property in dispute.

Still, however, it is assumed, in the 4th and 5th grounds of demurrer, that, as deeds, they are void, because moving

from the husband to the wife. It was insisted, in the argument, that the husband could not convey directly to the wife. The idea is presented that even if a deed, from husband to wife could be considered as passing title, it would accomplish nothing, for the reason, that so soon as the title vested in the wife, the husband's marital rights would attach, and the title at once revert in him. This is a strictly legal view of the subject. But there are equities, between husband and wife, which, though ignored by Courts of Law, are constantly recognized and supported in Courts of Equity. "A separate estate (in the wife) may exist without the intervention of a trustee. The husband will, in that case, take the legal estate, but Equity will regard him as trustee for the wife;" 12 *Geo. Rep.*, 195. If equity so regard a conveyance, moving from a third person, why not, when the husband conveys directly to the wife, with intent, *bona fide*, to confer a benefit on her, that the conveyance is a declaration of a Trust, and hold him and his representatives bound by it? There is no conceivable reason why this should not be done, where, as in this case, (according to the allegations in the Bill,) the property came to him through the wife, with an understanding that it should be her separate property.

That Equity will often support a conveyance directly to a married woman, is well settled.

2. *Story's Equity Jurisprudence*, §§ 1374-5-8 citing; 2 *Swanst*, 106, 107; 1 *Atkyns*, 270, 271.

"The true intent of the parties will be carried into effect in Equity without regard to form, and a contract is generally valid between husband and wife, without the intervention of a Trustee." 1 *P. Wms.* 125, 6 *Id.* 264; 2 *Vernon* 689.

In the case before us, the husband who executed the deeds under consideration, has departed this life.

The surviving wife is the mother of ten or eleven children, the fruit of her marriage with him. They take an interest in remainder under one of the deeds. The property came to him through her, from her mother and her brother, and he received it with the understanding that it should be secured to her, and always treated it as her separate property. She is in possession of it, and has been since his death, in April, 1856.

It does not appear that the rights of creditors are at all involved. But the Administrator *de bonis non*, of the husband,

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is endeavoring to recover the slaves conveyed in the deeds, attached as Exhibits A. & D., and their increase. Such is the case made in the Bill, and we are of opinion that the demurrer should have been overruled, and the defendant required to answer, and, therefore, reverse the judgment.

JUDGMENT.

Whereupon, it is adjudged by the Court, that the judgment of the Court below be reversed upon the ground that the Court erred in sustaining the demurrer, and dismissing the Bill; this Court holding that the third instrument in the order of time, from defendant's intestate to plaintiff in error, as exhibited to said bill, is a deed, and not a testamentary paper, and that complainant took a separate estate under the first and last deeds as exhibited in which Equity will protect her.

Lillibridge vs. Ross.

LILLIBRIDGE vs. ROSS.

A. R., by his last Will, amongst other bequests, gave all the rest of his property to his wife, E. R., for and during her natural life, and after her death to descend to the heirs of her body, to hold to the said heirs of her body, *share and share alike, and to their heirs and assigns forever*; but if his wife should *die without issue*, then the said property to be rented and hired to the best advantage; and out of the first rents received, he gave five hundred dollars to his brother's widow, the sister of his wife; and the remainder, when collected, to be appropriated and applied towards the maintenance and support of two of his brother's children (naming them), while they are under age and unmarried; but as soon as the last of said children shall become of age, or marry, the testator directed that all his property descend to all his said two brothers' children, who may then be alive, to be equally divided between them, share and share alike; to hold to them respectively, their heirs and assigns for ever. He nominated his wife executrix, and his dear and trusty friend, J. T. R., executor of his Will, giving and granting to them "all my full power and authority to execute the same, according to the true intent and meaning thereof." *Held*, 1, That E. R., the wife of testator took an estate for life only, and that her heirs, had she left any, would have taken as purchasers. 2, That the limitation over was good, not being upon an indefinite failure of issue of E. R., but of heirs, at the time of her death. 3, That the limitation over was not obnoxious to the rule against perpetuities.

In Equity, in Chatham Superior Court. Decision on demurrer, made by Judge FLEMING, in vacation.

On the first day of April, 1859, David Ross, James Ross, Elijah Ross, Abner S. Ross, Anne Taylor, formerly Anne Ross, by her next friend, Elias Taylor; Caroline Sayres, formerly Caroline Ross, by her next friend, Elias Sayres; Elizabeth Hopkins, formerly Elizabeth Ross, by her next friend, James I. Hopkins, filed their bill in equity, returnable to the May term, in said year, of the Superior Court of Chatham County, against Oliver M. Lillibridge, executor of the last Will and Testament of Elizabeth Ross, alleging that their uncle, Abner Ross, departed this life on or about the day of _____, in the year eighteen hundred and twenty, having first made and executed a last Will and Testament, of which the following is a copy:

STATE OF GEORGIA: I, Abner Ross, being of sound health, memory and understanding, do make, publish and declare

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this my last Will and Testament, as touching such worldly property as it has pleased God to bless me with, or which I shall die seized and possessed of, after paying all my just debts and funeral expenses. I give, devise and bequeath the same, in manner following, that is to say : My Estate, both real and personal, consisting of one equal half, or moiety, of an Improved Lot on the Bay, in the City of Savannah, whereon I lately resided with O. Martin Lillibridge, known by the number five, in Franklin Ward, and the half of one unimproved lot, number four, in New Franklin Ward, and also the one-half, or moiety of a half lot of Land, improved, near the Market Square, in Ward, known by the number six, and which was jointly purchased and now equally owned by O. Martin Lillibridge and myself, from Henry William Oakman ; one-half, or moiety of a plantation, or tract of land, in Effingham County, on the Louisville road, containing two hundred and sixty-two acres, with the improvements and live-stock thereon ; and also the one-half of a colored slave negro woman, and of a negro boy named Jack, together with all the rights and credits, books of accounts, bonds, notes that is belonging to the firm of Lillibridge & Ross, and generally all other articles not herein enumerated, to me belonging, and in any wise appertaining, that I shall die seized and possessed of, whensoever and wheresoever to be found, I give unto my dearly and well-beloved wife, Elizabeth Ross, for and during her natural life, and after her death to descend to the heirs of her body, to hold to the said heirs of her body, share and share alike, and to their heirs and assigns forever. But if it should please God that my said wife should die without issue, then it is my Will that my said real and personal Estate be hired or rented out, to the best advantage ; and out of the first rents received, that five hundred dollars be given to my brother's widow, who is my wife's sister, namely, Latishia Ross, of Savannah, in token of my sincere regard for her, to hold to her forever ; and the remainder of the rents, when collected, to be appropriated and applied towards the maintenance and support of my brothers' (Elijah Ross and Ezekiel Ross) children, while they are under age and unmarried ; but as soon as the last of such children shall become of age, or married, it is my will, and I do hereby order, that all my said property, real and personal, of what nature or kind soever, shall descend to all and every of such

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of my said brother's children as may be then alive, to be equally divided amongst them, share and share alike, to hold to them severally and respectively, and to their heirs and assigns forever. And lastly, I do hereby nominate, constitute and appoint my dear and loving wife, Elizabeth Ross, to be Executrix, and my dear and trusty friend, James T. Ross, to be my Executor of this my last Will, hereby giving and granting, to my said executrix and executor, all my full power and lawful authority to execute this my Will according to the true intent and meaning thereof. In witness whereof, I, the said testator, hath and doth hereunto set my hand and seal, at Savannah, the 25th day of May, in the year 1815.

ABNER ROSS. [L. s].

That the said Elizabeth Ross has departed this life, leaving a last Will and Testament, by which said Will, Oliver M. Lillibridge is constituted the executor, and that, as such executor, he has in his possession and control the property which was devised and bequeathed in the Will of the said Abner. That Ezekiel Ross, one of the brothers of the said Abner, in said Will mentioned, is dead, leaving no issue; that the complainants are the only children of Elijah Ross, the other brother, who has also departed this life, and as such they pray an account of the said Estate of the said Abner, from the said Oliver M., alleging that the said Elizabeth had but a life-estate therein, and that they, the complainants, are entitled to the remainder.

To which said bill in Equity, the said defendant, by his Solicitor, at the return term thereof, filed a general demurrer, and an order was taken that the said demurrer be argued in vacation, and thereupon, after argument had, the Judge of the said Superior Court of Chatham County rendered a decision, overruling the demurrer, and ordering the defendant to answer the bill.

This decision is the error assigned in the Record.

LLOYD & OWENS for the plaintiff in error.

WARD, JACKSON & JONES for the defendants in error.

By the Court.—LUMPKIN, J., delivering the opinion.



Considering the time that has been consumed in Courts in discussing questions like those involved in this record, brevity, it would seem, is the greatest merit that an opinion could claim, which is written upon them.

After the decision by this Court in *Jackson vs. Adams*, 14 Geo. Rep. 557, and numerous parallel cases, before and since, I should esteem it a work of supererogation to undertake to show that, by the Will of Abner Ross, Elizabeth Ross, his wife, took an estate for life only in his property, real and personal, and that after, and at the time of her death, it went to her heirs-at-law, or distributees.

There are but two questions in this record open to examination. After the above bequest, the testator provides, "But if it should please God that my wife should *die without issue*, then it is my Will that my said real and personal estate be hired or rented out to the best advantage, and out of the first rent received that five hundred dollars be given to my brother's widow, who is my wife's sister, namely, Latishia Ross, of Savannah, in token of my sincere regard for her, to hold to her forever; and the remainder of the rents, when collected, to be appropriated and applied towards the maintenance and support of my brothers' (Elijah Ross and Ezekiel Ross) children, while they are under age and unmarried; but as soon as the last of such children shall become of age, or marry, it is my Will, and I do hereby order that all my said property, real and personal, of what nature or kind soever, shall descend to all and every of such of my said brother's children as may be then alive, to be equally divided amongst them, share and share alike, to hold to them severally and respectively, and to their heirs and assigns forever. And lastly, I do hereby nominate, constitute and appoint my dear and loving wife, Elizabeth Ross, to be executrix, and my dear and trusty friend, James T. Ross, to be my executor of this my last Will and Testament, hereby giving and granting, to my said executrix and executor, all my full power and lawful authority to execute this my Will, according to the true intent and meaning thereof. In witness whereof," etc.

Do the words "*die without issue*" mean, in this Will, an indefinite failure of issue? We concede frankly that Counsel for the plaintiff in error has cited strong and direct authority, that they do. These adjudications are to this effect: that it was the general intent of the testator, Ross, by the

use of the technical words "descend to the heirs of the body of Elizabeth Ross," to create an estate-tail; that admitting the superadded words, "share and share alike, and to their heirs and assigns forever," etc., so far controlled the technical words "heirs of her body," as to make them words of purchase, and not of limitation; yet that inasmuch as the limitation over is upon an indefinite failure of issue, "die without issue," it shows that the testator, abandoning his particular intent, returned to his general intent; and consequently the Will stands as though it bequeathed the property to his wife, for life, and, after her death, to the heirs of her body.

We will state succinctly our reasons for dissenting from this doctrine. No such precedent is produced prior to May, 1776. All the reported cases read (and from the known ability and research of Counsel, we are warranted in concluding that none older could be found), are subsequent to the period of the Revolution. It is well known that, down to Lord Mansfield's day, and during his administration, a more liberal construction had obtained, culminating in the leading case of *Doe ex dem. Long vs. Lanning*, 2 *Burrow*, 1100, which, criticised and perhaps overruled as it has been since in England, was law at the time our adopting statute took effect, and has always been followed and approved in this State as such. Lately, the English Courts had adopted a more stringent rule, until the Parliament of Great Britain has been compelled to interfere (as the Legislature in Georgia has likewise done), thereby releasing the subjects of that Kingdom, as well as the people of this State, from all the subtleties and refinements of legal and judicial pedantry upon this subject. Are we constrained, then, to incorporate this comparatively modern doctrine into our system, as a rule of property? We think not.

Again, with the most profound reverence for Lord Kenyon and Lord Eldon, we must say, that, to our humble apprehension, their reasoning is fallacious, and was neither more nor less than evincive of a predetermination to sustain a particular policy—subversive, though it might be, of the intention of testators.

If the whole clause in the Will, including the superadded words, created an estate for life in Elizabeth Ross, with remainder in fee to her heirs, how, I would ask, is it assumed,

that, by the use of a part of the words in that clause, to wit: "heirs of the body," it was the primary general intent to create an estate-tail? Is it admissible to divide a clause, instead of taking the whole together, to justify such a conclusion? We think not.

Again, it is contended that "to die without issue," in the limitation over, means an indefinite failure of the progeny of Mrs. Ross, notwithstanding they took as purchasers. How could the testator be supposed to contemplate such a contingency, when each one of these heirs, taking, as he did, a fee to his distributive share, became the root or *propositus* of a new inheritance? He acquired the unlimited power of disposing of his share, by deed or Will, or any other way he saw fit. And yet, after aliening the property, and its getting scattered to the four quarters of the globe, if, at some distant period, the entire progeny should fail, Mr. Ross undertakes to devise this property over!

What would be the proper view of such a clause? Why, that the testator intended, by the words "*issue*" in the limitation clause the same class of persons designated in the first; that is to say, in this Will, children and grand-children, heirs or distributees of his wife. This harmonizes his intent. The other construction mars and defeats it. Had he used the word *issue* in the first clause, giving the estate to Mrs. Ross for life, and after her death to her *issue*, share and share alike, etc., and then proceeded as he did; and if she die without *issue*, etc., all would have been impressed with the identity of meaning. Using the words "heirs of the body," and "*issue*," does not lead to any different conclusion as to intention.

Having been cheered by our Statute by a glimpse at fairy land, let us not unbidden plunge again amidst the disheartening gloom of *Preston on Estates*, *Fearne on Remainders*, to say nothing of *Coke*, *Plowden*, and the *Year Books*. Technical rules are binding in questions of property, and we cannot supersede them. But following, in this case, the irresistible impulse of our judgment, and sustained, as we think, by common sense, let us not be tempted to plume our wings for another flight to the clouds, in search of occult lore, for grounds to say, what we know was the Will of Abner Ross shall not be his Will.

The other question in this case, is this: Is this limitation

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over too remote? It does not appear but that one of the brothers of the testator had children, at his death. It is altogether probable that there were children born before the death of his wife, who lived to extreme old age, and it is the remainder-men who have filed this bill. In *Stephens vs. Stephens*, cases *Temp. Talbot*, 2287, decided in 1736, it was held that a devise to such unborn son of a *femme covert*, as should first attain the age of twenty-one years, was held to be good. Since that time, an executory devise, to this extent, has been uniformly upheld, and is received as a part of the system of our American Testamentary Jurisprudence.

And in this case, the testator expressly clothed his executrix and executor "with all his power and lawful authority, to execute his Will according to the true intent and meaning thereof." In other words, he constituted them Trustees for this purpose. After the termination of the life-estate, five hundred dollars is to be raised out of the rents, issues and profits, for his wife's sister, the remainder, when collected, to be appropriated and applied towards the maintenance and support of his brothers' children, while they are under age and unmarried; but as soon as the youngest of his nephews and nieces becomes of age or marries, the whole to go to all of Elijah and Ezekiel Ross's children, as may be then alive, to be equally divided amongst them, share and share alike, to hold to them, severally and respectively, and to their heirs and assigns forever: the very same disposition which he intended to be made amongst the heirs of his wife—to whom he was evidently tenderly attached—had she been blessed with any by any future husband.

If this be even a contingent remainder, or executory remainder, and no child or children had been born to his brothers, at the death of the life-tenant, still it would have been held by the testamentary Trustees, to wait the possibility of such an event. But this supposition does not comport with the facts of the case. Neither is this the proper construction to put upon this bequest. I only state the case most strongly for the defendants.

Our conclusion, therefore, is, that the limitation over does not create a perpetuity. Whether this point was made in the Court below, does not appear. It is not noticed in the decision upon the demurrer, and but slightly argued in this Court.

The judgment of the Circuit Court, overruling the decision, and ordering the defendants to answer the bill, is affirmed.

JUDGMENT.

Whereupon, it is considered and adjudged by the Court, that the Judgment of the Court below be affirmed.

GAUT & MCPHERSON vs. CARMICHAEL & CO.

When the verdict is without evidence, a new trial must be granted.

Certiorari from Chatham Superior Court. Decided by Judge FLEMING on the 15th of November, 1860.

Carmichael & Co. brought an action in the City Court of Savannah, against Gaut & McPherson, to recover the sum of \$288.20 which was alleged to be so much money had and received by the said Gaut & McPherson, to, and for the use of, the said Carmichael & Co. The bill of particulars annexed to the declaration is as follows :

"Messrs. Gaut & McPherson,		
"1857.	To Carmichael & Co.,	Dr.
"May 20th.	To 100 Sacks of Wheat short of receipts from invoices, average 2 bushels per sack, making 200 bushels at \$1.20	\$240 20
	"To 109 sacks for same 18c.	18 00
	"To 5 per cent. com's on \$253.00	12 60
		<hr/>
		\$265 60
	"To error in com'ns admitted	22 60
		<hr/>
		\$288 20

Gaut & McPherson vs. Carmichael & Co.

Upon the trial of the case, at the May Term, 1859, of said City Court, the plaintiffs offered in evidence the following depositions of Augustus Robert, to-wit:

"I am personally acquainted with the plaintiffs, and know the defendants from due course of business correspondence with them for the plaintiffs; I am a book-keeper, and served the plaintiffs as book-keeper and general agent during the year 1857; the account annexed is a copy of an original, prepared by me from plaintiffs' books, (in which I made the charges myself,) after a careful examination of the business transactions between the plaintiffs and defendants; and I believe the same is correct as stated, and is justly due by the defendants to the plaintiffs; no part of the account has been paid to the plaintiffs to my knowledge; in the early part of the year 1857, the defendants purchased divers lots of wheat for the plaintiffs at a commission of five per cent. for their services, and forwarded invoices, charging the plaintiffs with four thousand and eighty sacks of Wheat, for which number the plaintiffs paid them as invoiced; during the months of February, March and April, the defendants forwarded to plaintiff receipts of the E. T. & G. R. R., and the W. & A. R. R., showing the shipment of three thousand nine hundred and eighty sacks of wheat, which number the plaintiff received through the Geo. R. R. & B. K. G. Co., with all of which I credited them; the remaining one hundred sacks were never received, nor did the plaintiffs ever get any railroad receipt or other evidence that they had ever been shipped; I therefore charged the defendants with that number (100) short, allowing two bushels to the sack, at one dollar and twenty cents per bushel, (that being the average quantity in a sack, and the average of the prices charged, according to the invoices,); also, with one hundred sacks or bags, at 13 cents each; and with five per cent. commissions on \$253.00, the average cost of the wheat and sacks charged in their invoices; the item for "error" defendants admitted by a letter now in the hands of George A. Gordon, plaintiff's attorney; my knowledge of the facts was derived from the letters of defendants, and their invoices addressed to plaintiffs, received, read and carefully examined by me; from the railroad receipts and bills hereto annexed, and from plaintiffs' books kept by me; I did not measure the wheat; the sacks were counted and checked at the mill by the R. R.

receipts, all of which are annexed except four, and failing to find the originals of the four, I annex *duplicates*; I cannot say how much wheat each sack contained without taking the average from the invoices; in that way I ascertained that it would be fair to charge the defendants with two bushels per sack; the average, from the weights, as shown by the railroad receipts, will show a greater number of bushels short, as I announced to defendants by letter of 23d of June, 1857; I did not measure a single sack; it is possible that in some cases the number of sacks may be short, and yet the quantity of wheat be not short, but this is not likely to occur."

These depositions were objected to by counsel for the defendant on various grounds, which were overruled by the Court, and the depositions were all admitted except the statement of the witness as to "the average quantity of wheat per sack, and the average price per bushel."

Charles F. Mills, in behalf of plaintiff, testified: That the price of wheat in 1857 was about one dollar and twenty cents per bushel, but that there were different kinds of wheat, and the price fluctuates at different seasons of the year; the witness knew nothing of the quality or the price of the wheat in question.

Plaintiffs at this point having closed their testimony, the defendants' counsel moved for a judgment of non-suit, on the ground that the plaintiffs had not proved that they had paid the defendants any amount of money.

This motion was overruled by His Honor Judge MILLEN, presiding in said City Court.

Counsel for the defendants then read in evidence the following depositions of R. M. McClung, to-wit:

"I was in the employment of the defendants during the year 1857, and believe that the statement of the plaintiffs correctly represents the dealings between the parties during that year; as all the wheat charged was put in the depot for shipment, I believe it was shipped; I cannot say whether the sum as shown by defendants' statement was ever tendered to the plaintiffs, nor can I say that they were ever told that it was subject to their order; all the money sent by plaintiffs to defendants was exhausted in the purchase of wheat, as shown by the annexed statement, and by the books of defendants; defendants did not at the time engage in the

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purchase of wheat, except for the plaintiffs, and as no wheat was sold, except one lot too small for shipment, I cannot see how the wheat should fall short, as much as claimed by plaintiffs; I am not interested in this suit; I am no kin to Gaut, but am the second cousin of McPherson; I kept the books of defendants, which are now in McPherson's possession; I have had access to them, and upon examination, find them just as I left them; there was no written agreement between the parties; it was the custom of defendants to send railroad receipts generally for each shipment, and such is the customary way of doing business; I made out one or two statements of the account, but do not recollect the date of the accounts, nor the number of sacks called for in each one; the plaintiffs did notify defendants of a discrepancy between their invoices and goods received, and that they claimed the difference."

The testimony being closed, the Jury returned a verdict in favor of plaintiffs, for the sum of \$288.20 with costs of this suit.

The rulings and judgment of the Court and Jury were excepted to by counsel for defendant, and carried by Certiorari to the Superior Court of Chatham County, on the following grounds, to-wit:

1st. That His Honor Judge Millen erred in overruling the objection made by counsel for the defendants to the depositions of Augustus Robert, on the ground that the witness's statements of the account attached to the interrogatories were only secondary and illegal, being derived from the plaintiffs, and said account being only a copy.

2d. That His Honor erred in admitting in evidence the statement of the witness of matters of fact derived from certain invoices furnished by defendants, and from letters of defendants.

3d. That His Honor erred in overruling the motion of counsel for defendants for a judgment of non-suit, made on the ground that the evidence of the plaintiffs furnished no statement of damages.

4th. That the verdict of the Jury was contrary to Law, and contrary to and without evidence.

Upon hearing the Certiorari, His Honor Judge Fleming dismissed the same, and affirmed the judgment of the City Court. This decision is the error alleged.

WILSON, NORWOOD & LESTER, for the plaintiffs in error.

No appearance for the defendants in error.

By the Court.—LYON, J., delivering the opinion.

On the trial of this cause before the Judge of the City Court of Savannah, counsel for the defendant objected to the admissibility of certain parts of the evidence of the witness, Augustus Robert, in this: That the statements of the witness, as to the account sued upon, were secondary, derived from plaintiffs, from invoices and letters, that were not introduced in evidence, or accounted for. The testimony is open to this objection, but as no fact, materially affecting the issue, is drawn out by this reference, we have not thought it necessary to consider the objection. Neither is it necessary to consider the motion for non-suit, as the merits of that question, and all others in the case is involved in the fourth and last exception, namely: That the verdict is without evidence, and contrary to evidence and Law. This exception, we think, was well taken, and ought to have been sustained by the Court below.

The action was brought for the recovery of the loss sustained by the non-delivery of 100 sacks of wheat for which the plaintiffs had paid the defendants.

It appears from the evidence of the witness, Robert, who was clerk and book-keeper for the plaintiffs, that the defendants, in the Spring of 1857, purchased for the plaintiffs four thousand and eighty sacks of wheat, at a commission of 5 per cent., for which the plaintiffs paid them. Of this only three thousand nine hundred and eighty sacks were forwarded to, or received by, the plaintiffs. This part of the plaintiffs' case is sufficiently made out; that is, that there was 100 sacks short; but how much these sacks contained, or the price paid by plaintiffs to defendants for the contents of the sacks, does not appear, nor did the witness know. He says he estimated the costs of the various lots purchased, and of the quantity contained in the whole lot, and from this estimate he deduced the average cost per bushel, as well as the average contents of each sack. It was in this way the witness made up the account, and he says he believes the same to be correct as stated, and justly due by defend-

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ants to plaintiffs. But this belief is founded altogether on the estimate made by the witness from the invoices, letters, &c., before him. This belief of the witness was not evidence of the fact for the Jury, however conclusive it may have been to the witness. The Jury should have had these invoices, letters, &c., before them, so as to have made the calculations for themselves; had they have come to the same conclusion as the witness, from their own estimates, upon an examination of the same data, the verdict would have been good; but they might have come to a different one. The Judge of the City Court excluded from the Jury that part of the witness's evidence as to the average contents of the sacks, and the average cost of the wheat per bushel and very properly, we think. This testimony being out, there was absolutely no evidence before the jury of the contents of the sacks, or the cost of the wheat therein. Yet, the Jury, by their verdict, say that there was two bushels in each sack, that cost one dollar and twenty cents per bushel. That much of the finding, therefore, was without evidence, and a new trial must accordingly be granted.

JUDGMENT.

Whereupon, it is adjudged by the Court, that the Judgment of the Court below be reversed, on the ground, that the Court erred in not reversing the judgment of the City Court. A new trial should have been granted on the ground, that the verdict was without evidence.

KING AND WIFE, *et al.* vs. DUNHAM *et al.*

1. There being in a marriage settlement after the termination of two estates for life, and upon failure of issue of the marriage, a limitation over "to the heirs of S. A. (the Grantor.*)" *Held*, that the remainder-men took *as heirs*, not as purchasers.
2. The marriage settlement having been in the lives of the parties to it, reformed, by consent, between themselves and the Trustees, so as to vest the property absolutely in the husband upon the death of the wife, without issue of the marriage surviving her; *Held*, that the decree so reforming the marriage settlement, was good against such persons as would have been heirs at Law of the settlor, had she died at the time the settlement was executed, even though they were not parties to the Bill by which the settlement was reformed.

In Equity, in Liberty Superior Court. Decision on demurrer made by Judge FLEMING.

Thomas King and his wife Susan King, Ann S. Anderson, and her children, George Anderson, Richard Anderson and Mary Anderson, who being minors sued by their mother; the said Ann S. Anderson, as their next friend, filed their bill in equity in the Superior Court of Liberty County, in which it is alleged:

That Sarah A. Anderson, the sister of one of the defendants, Joseph A. Anderson, and of the said Susan King, and the aunt of the said George, Richard and Mary Anderson, which last named three, are the children of William Anderson, deceased, who was the brother of the said Sarah Anderson, being possessed of a considerable property, real and personal, and being about to enter into a matrimonial alliance with one Thomas K. Dunham, on the 19th day of December, 1850, with the knowledge and consent of the said Thomas K. Dunham, he being a party thereto, executed a deed of marriage settlement as follows, to-wit:

STATE OF GEORGIA, LIBERTY COUNTY:

This Indenture, made this nineteenth day of December, eighteen hundred and fifty, between Sarah Anderson, of Wal-thourville, in the State of Georgia, of the first part, and Dr. Thomas K. Dunham, of Camden County, in said State, of the second part, and Joseph A. Anderson and Charles B. Jones, of said County and State, of the third part: Whereas, the

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said Sarah Anderson is now lawfully seized and possessed of the following real estate, to-wit: an undivided portion of the Plantation known as the estate of William Anderson, lying in said County and State, for boundaries of which reference is made to the plat thereof, and of sundry other tracts of pine land lying in the said County and State, and the following negro slaves, to-wit: Joe, Ned, Agrippa, Pompey, Sim, Sam, (Carpenter,) Tamor, Patience, Mary, Ben, Prime and Matilda, twelve in number; and whereas, the said Sarah Anderson may hereafter become entitled and possessed of other property, real and personal; and whereas a marriage is intended, by God's permission, shortly to be had and solemnized between the said Sarah Anderson and Thomas K. Dunham.

Now, this Indenture witnesseth, that the said Sarah Anderson, for, and in consideration of the said intended marriage, and of the sum of five dollars to her in hand paid by the said Joseph A. Anderson and Charles B. Jones, the receipt whereof is hereby acknowledged, and by and with the assent and approbation of the said Thomas K. Dunham, her intended husband, hath granted, bargained, sold and released, and by these presents doth grant, bargain, sell and release unto the said Joseph A. Anderson and Charles B. Jones and the survivor of them, and the executors, administrators and assigns of such survivor, all that above described estate, both real and personal, together with all and singular the hereditaments, rights, members and appurtenances that may in anywise belong or appertain to the same, and all the estate, right title and interest whatever, in law or equity, of the said Sarah Anderson, and also the negro slaves above named, with the issue and future increase of the female slaves.

To have and to hold the said lands and slaves and all other premises above bargained and conveyed unto the said Joseph A. Anderson and Charles B. Jones, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, in trust to, for and upon the following uses, trusts and conditions, that is to say: In trust to the only proper use, benefit and behoof of the said Sarah Anderson and Dr. Thomas K. Dunham, but not in anywise subject to the debts of the said Thomas K. Dunham, during their natural lives, and the natural life of the survivor of them, and from and after the death of the survivor of them, then in trust for the use and benefit of the issue of the said marriage, his, her

or their heirs and assigns, if any such issue there be, and in default of such issue, then in trust for the heirs of said Sarah Anderson, the above property reverting back after the death of the survivor to the heirs of the said Anderson, their heirs, executors, administrators and assigns, and not to the heirs of the said Thomas K. Dunham.

And the said Thomas K. Dunham, for himself, his heirs, executors, administrators and assigns, doth covenant, promise, grant and agree to, and with the said Joseph A. Anderson and Charles B. Jones, and the survivor of them, and with the executors, administrators and assigns of such survivor, that any and all property and estate, real or personal, which may fall or come to the said Sarah Anderson during her coverture, shall be, notwithstanding her coverture, held to, for and upon the uses, trusts, above expressed, and it is mutually agreed by and between the parties to these presents, that it shall and may be lawful, at any time hereafter, for the said Joseph A. Anderson and Charles B. Jones, or the survivor of them, to grant, bargain and sell, any part or portion of the property, real and personal, above settled and assured, they, the said Sarah and Thomas K. Dunham, or the survivor of them requesting the same in writing, the proceeds of such sale to be invested in other property, to be held on the same trusts and conditions as are herein before expressed.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year above written.

S. A. ANDERSON,	L. S.
THOS. K. DUNHAM,	L. S.
JOS. A. ANDERSON,	L. S.
CHARLES B. JONES,	L. S.

In presence of
G. Troup Maxwell,
A. M. Jones.

That said deed, after being duly proved, was recorded in the Office of the Clerk of the Superior Court of Liberty county, on the 10th of February, 1851; that said marriage was duly solemnized, and the said Sarah and Thomas K., lived together as man and wife, until the 22d day of April, 1852, when the said Sarah departed this life, without ever having had issue, leaving the said Thomas K. Dunham, her survivor; that the health of the said Sarah A., during her married life was very much impaired, and became more and more feeble up to the time of her death; that on the 10th day of January,

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1852, when it had become most manifest, that the said Sarah A., from her rapidly declining health could not long survive, and that there was no probability of issue of the marriage, she was prevailed on by her husband, the said Thomas K. Dunham, to consent to a modification of the terms of said deed of marriage settlement, and to sign a written statement of the proposals for such modification, and to procure her trustees, who were unwilling to oppose her application, in her feeble state of health, to sign the same, of which the following is a copy, that is to say :

In the case of Dr. Thomas K. Dunham's marriage settlement, it is proposed to modify the limitation of the deed according to the original design of the parties, so that the use of the property shall be in D. and Mrs. Dunham during their natural life, and after the death of Dr. Dunham, (if that should occur first,) then for the use of Mrs. Dunham during her natural life, and after her death, then to the child or children of the marriage. In case of the death of Mrs. Dunham first, leaving a child or children, then in trust for Dr. Dunham's use during his life, and after his death, then to such child or children. If no children at the time of her death, then to Dunham absolutely, if he be the survivor, but if he be not the survivor, and there are no children at his death, then to Mrs. Dunham absolutely to dispose of as she pleases.

We, the original parties to said marriage settlement, agree hereby to the modifications above proposed, and consent that an amicable bill be filed for such purpose in Liberty Superior Court, and that we be made parties thereto, or such other course be pursued as will effect such object.

SARAH A. DUNHAM,
THOMAS K. DUNHAM,
JAS. A. ANDERSON,
C. B. JONES.

10th January, 1852.

That the April Term, 1852, of the Superior Court of Liberty, a bill in equity was filed in the name of the said Sarah A. and Thomas K. Dunham, to reform the said deed of marriage settlement, in accordance with the proposals contained in said statement.

That on the 20th day of April, 1852, there was a decree rendered in said case, of which the following is a copy, that is to say :

This cause came on to be heard on Bill, Answer and Exhibits; whereupon, it is ordered, adjudged and decreed, and we, the Jury, do order, adjudge and decree, that the prayer of the complainants be granted; and that the trusts of the said deed be so modified as to suit the desire of the parties, as expressed in said Bill and Exhibit, so that the use of the property shall be in the complainants during their natural lives, and after the death of the said Thomas K. Dunham, if that should occur first, then that said property be for the use of said Sarah A. Dunham during her natural life, and after her death, then to the child or children of the said marriage; that in case of the death of said Sarah A. Dunham first, leaving a child or children, then in trust for said Thomas K. Dunham during his life, and after his death, then to such child or children; but if no child or children at the time of her death, then to said Thomas K. Dunham absolutely, if he be the survivor, but if he be not the survivor, and there be no children at the time of his death, then to the said Sarah A. Dunham absolutely, to dispose of as she pleases.

And it is further ordered, adjudged and decreed, that a deed be prepared and that it be executed by the parties, pursuant to this decree, and that such deed stand and be considered in lieu and place of said original deed of marriage settlement.

The complainants further allege, that this decree was rendered only two days before the death of the said Sarah A., and whilst she was hopelessly ill; that there was no mistake nor misunderstanding in regard to the trusts of the deed of 19th December, 1850; that it was drawn in conformity with the wishes and desires of said Sarah A., and according to the instructions which she herself had given; that she read the deed and approved its trusts: that no pretence of ignorance on the part of the said Thomas K., of its nature and trusts was made for more than a year after its execution, nor until within about two months of the death of the said Sarah A., when her health was rapidly sinking, and her mind and body both weakened by disease, she was persuaded by the solicitations of the said Thomas K., to acquiesce in his desires and wishes, and to sign the instrument consenting to the modifications of the deed as proposed by him, and unduly pressed upon her in her weak and sinking condition; that the said Thomas K. Dunham survived the said Sarah A. Dunham,

and took and kept possession of the entire property so settled by the said deed of settlement, until his death, which happened on the _____ day of _____ in the year eighteen hundred and fifty _____; that the said Thomas K. Dunham before his death, made and published his last Will and testament, by which he devised and bequeathed the whole of the said settled property of his said wife, the said Sarah A., to his own relatives, heirs and next of kin, to the entire exclusion of the heirs of the said Sarah A., as provided for by the deed of settlement, of the 19th of December, 1850, and by said Will appointed the defendant Henry R. Fort, executor of said Will; the defendants, Ann Dunham, William Dunham, John Dunham, James Dunham, Joseph Dunham, George Dunham, — Crawford and his wife Jane, E. H. Hart and his wife Esther, David Dunham, Andrew J. Dunham are the heirs and next of kin of the said Thomas K. Dunham, and devisees and legatees under his said Will; that since the death of the said Thomas K., the said property and estate so settled in trust, has been taken possession of by said Fort as executor as aforesaid, and by all, or some, of the other defendants, and is held and claimed as their property, under said Will of Thomas K. Dunham; that the complainants and the defendant Joseph A. Anderson, are the heirs at law and next of kin of the said Sarah A. Dunham, (formerly Anderson,) and as such, entitled under the deed of settlement, of nineteenth of December, 1850, to the said settled property, upon the death of the said Sarah A., and Thomas K. Dunham, without issue, and that the said Charles B. Jones has departed this life; that complainants are aggrieved by the said decree, and that they ought not to be bound thereby; that said decree was improvidently granted and rendered, in what was treated as an amicable bill without consideration or regard to the interests of these complainants as remaindermen under the said deed of settlement, and that no such decree should have been pronounced or made, affecting the interests of these complainants in remainder under said deed; and that the same decree is erroneous and ought to be reversed, and for errors, do assign the error therein as followeth: First, because complainants say, and hope to maintain, that the rights and interests of these complainants under said deed of 19th of December, 1850, were such that it was not legally or equitably competent to the parties to said deed, or any

Court of Law or equity to change or annul them, unless for some clearly proved mistake, accident, or fraud in its creation and execution; and secondly, because it is apparent upon the face of said bill, pleadings and exhibit which composed all the proofs in said case that no such mistake, accident, or fraud in the procuring and execution of said deed is either alleged or was proved; thirdly, because the consent of the said Sarah A. to the proposals for modifying the trusts of said deed was procured by entreaty, and persuasion, and undue influence exerted upon her in her last illness, and but a short time before her death; fourthly, that your orator and oratrices were no parties to said bill or proceedings, and ought not to be bound by the said decree.

The prayer of the bill is, that the decree and the proceedings had thereon, may be reviewed and reversed, and the deed of the 19th of December, 1850, may be confirmed and reestablished; that the defendants may be compelled to deliver to the complainants as heirs at Law of the said Sarah, all the property settled by said deed, and account for the rents, hire and profits of the same; and that the complainants have such other relief as to the Court shall seem meet according to equity and good conscience.

To this bill, counsel for defendants set up a general demurrer, and after argument had thereon, the presiding Judge decided amongst other things—

“That under the marriage settlement between Sarah Anderson and Thomas K. Dunham, the complainants had no right in the property in dispute; that whatever interest they took in said property, was not as purchasers, but as heirs by descent; that under the facts of this case Mrs. Dunham had a perfect right so to change the deed of marriage settlement, as to give the property to her husband to the exclusion of her heirs; that although the complainants may not be bound by the decree changing the trusts of the deed, they had no interest in the proceedings, and the decree has deprived them of nothing; that the demurrer is therefore sustained and the bill dismissed.”

This decision is the error alleged in the record.

E. H. BACON, and LAW, BARTOW and LOVELL for plaintiffs in error.

King and Wife *et al.* vs. Dunham *et al.*

WILSON and HARDEN for defendants in error.

By the Court.—JENKINS, J., delivering the opinion.

Complainants seek by their Bill to set aside a decree rendered in a former suit in Chancery, (which they attach as an exhibit,) reforming the marriage settlement of Thomas K. Dunham and Sarah A. his wife, (formerly Anderson,) to which they were not parties. They claim to have had under the original settlement an interest, which was divested by the decree reforming it. They allege, that not having been parties to that suit, they are not bound by the decree, and this is undoubtedly true. But there is a preliminary question which must be determined in their favor before their right to impeach the former decree can be recognized, viz: whether they had a vested interest under the marriage settlement anterior to its reformation. By the terms of the settlement the property was settled to the use of the parties to the marriage during their joint lives, then to the use of the survivor, then to the issue of the marriage, his, her, or their heirs and assigns, if such there be, and in default of each issue, to the "*heirs of the wife*, (the property being her's) *the property reverting back after the death of the survivor to the heirs of Sarah Anderson, their heirs, executors, administrators and assigns, and not the heirs of the said Thomas K. Dunham.*" It is under the last clause that complainants claim to take as purchasers. If they did so take upon the execution of the marriage settlement, the subsequent decree reforming it, did infringe their vested rights, and they are entitled to be heard now, in opposition to the validity of that decree, but not otherwise.

After the termination of the life-estates created by the settlement, and on failure of issue of the marriage, the remainder was limited to the heirs of the grantor. To enable the plaintiffs in error to take as purchasers these words, "the heirs of Sarah Anderson must appear to be descriptive of certain persons to the exclusion of all others. Had the grantor used the words, "to the heirs of said Sarah A. *now living*," or "to such persons as would be the heirs of the said Sarah A. *were she now dead*," then the words would be *descriptio personarum*, and those answering that description would have taken as purchasers. There must be some words

amounting to a description of a person, or of persons, or something in the context clearly indicating that the remainder, so created, shall vest. 1st. *Fearn on Rem's* 208. Where the word "*heirs*" only is used, it must be taken in its most general sense, as referring to those persons who, upon the death of the grantor, (in this case,) would be her heirs. "*Nemo est heres viventis*," and where the term is used in this general sense, the identification of those to take upon the happening of the contingency, is necessarily postponed to the death of that person, as whose heirs they are to take. In this view, had the plaintiffs in error died before the grantor, they of course could not have taken, nor could their heirs through them.

Again, had the grantor survived her husband, Dunham, (there being no children of this marriage,) and then married again, not having survived her second husband, had then died, leaving children of the second marriage, and the plaintiffs in error surviving her, the latter could not have taken, because the children of the second marriage having intervened, would have been her heirs to their exclusion. Then it is clear that no interest vested in them.

But to escape this conclusion, we are called upon to hold, that the words "*heirs of Sarah A. Anderson*" in this deed, mean such persons as would be her heirs should she die that instant—mean heirs apparent or presumptive. If there be any Law for such construction we are not aware of it.

In our view of this case, there is no necessity to resort to the rule in *Shelly's* case, which has been pressed upon our consideration; and consequently, the very able and learned argument of counsel for plaintiffs in error, in reply, to prove that it cannot be brought within that rule does not control the case. These arguments have been highly entertaining and instructive, but we place the case upon another position assumed by counsel for defendants in error, viz: "*A limitation to the heirs of the grantor will continue in himself as the reversion in fee.*"

Fearn on Remainders, 50 and 51; *Preston on Estates*, 291; 1 *P. Williams*, 359; 2d. *Blackstone's Com.* 241—note.

Thus considered, the reversion took effect in the grantor, and upon her death the estate would have passed to such persons as then became her heirs at Law; but as it could not be known who those persons would be until her death, no person

took a vested interest during her life, no person could take, under that clause, any interest whatever, vested, or contingent, as purchasers.

Had that clause been omitted entirely upon the happening of the specified contingency, the estate would have reverted, and would have passed to those whose heirship to the grantor was established by her death.

The deed does no more than specify the course to be taken by the estate, which it would have taken by Law, without the specification.

In this view, Mrs. Dunham had a perfect right to consent to the proposed reformation of the settlement; and the decree, making that reformation with her consent, divested no pre-existing rights.

We affirm the judgment of the Court sustaining the Demurrer.

JUDGMENT.

Whereupon, it is adjudged by the Court, that the Judgment of the Court below be affirmed.

DESVERGES vs. DESVERGES.

To protect a voluntary division made by the distributees of an Estate who are at the time all *sui juris*, after the lapse of twenty or thirty years, an administration will be presumed.

When a fact is abundantly and confessedly proven, by the testimony on both sides, the admission of immaterial evidence to the same point, though illegal, will not entitle the opposite party to a new trial.

When one of the distributees consents to take the portion of property allotted to him, though unequal in value, it is a waiver of any objection for want of a just division.

Trover in McIntosh Superior Court. Tried before His Honor WILLIAM B. FLEMING.

This was an action of Trover, brought by Marsime J. Desverges, as administrator, *de bonis non*, of James C. A. Desverges, deceased, against John L. Desverges, to recover certain slaves alleged to be the property of the estate of said deceased.

The defendants pleaded the general issue, and Statute of Limitations.

The facts of the case, as developed by the testimony on the trial in the Court below, are substantially as follows :

James C. A. Desverges, the intestate of the plaintiff, died in the year 1803, possessed of property, of which that sued for and its descendants, is a part. The deceased left surviving him his wife, Martha, and two sons, to-wit: the defendant and one James M. Desverges. Shortly after the deceased's death, his widow inter-married with one John Wallace, who took out letters of administration on the deceased's estate, and kept the property without any distribution until the year 1822, when he died. After Wallace's death, Mrs. Wallace and James M. Desverges took charge of the property of said estate, and kept it together until, in the year 1832, a voluntary division of said property was made by and between Mrs. Wallace, James M. Desverges and John L. Desverges, all the parties at the time being *sui juris*. In 1834, James M. Desverges died. There was some evidence going to show inequality in the division, and some conflict in the evidence, as to whether James M. Desverges agreed to the division. At least, there was evidence that he

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objected to the manner in which the property was divided, but he nevertheless received his share and enjoyed the benefit of it up to the time of his death.

The property so divided remained in the possession of the parties and their representatives, until November, 1857, when the plaintiff, a son of James M. Desverges, took out letters of administration, *de bonis non*, on the estate of James C. A. Desverges, and brought the present action as such, to recover the property that was allotted in the division to the defendant.

On the trial, counsel for the plaintiff objected to the introduction of all proof showing the division, on the ground: that such a division could not be set up at Common Law, to bar the recovery by a regular administrator.

The presiding Judge overruled the objection, and admitted the evidence on the ground: That after the lapse of twenty-seven years, an administration would be presumed, and that such a defense was good against this suit.

To this ruling counsel for plaintiff excepted.

Part of the testimony showing the division consisted of the sayings of Mrs. Wallace and the defendant, coupled with the fact, that a part of the property went into the possession of Mrs. Wallace, part of it to James M. Desverges, and a part of it to the defendant.

This testimony was objected to by counsel for plaintiff, on the ground, that it was only hear-say, but the Court overruled the objection, and the plaintiff excepted.

When the testimony had closed, the presiding Judge charged the Jury:

"That if they found that there was a division of the estate by the three heirs, and also found that at the time of such division one of the heirs was not consenting thereto, but subsequently took the part allotted to him, whether an equal portion or not, his taking such portion was a waiver of his objection to the division, and made it good."

The Jury returned a verdict for the defendant, and the plaintiff in error seeks a reversal of the judgment on the following grounds, to-wit:

1. Because the Court erred in admitting the testimony objected to as aforesaid.
2. Because the Court erred in charging the Jury as before stated.

Desverges vs. Desverges.

NORWOOD, for the plaintiff in error.

HARDEN & GUERRARD, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We respectfully submit that the counsel for the plaintiff, neither in the bill of exceptions, nor in his argument before this Court, represents Judge Fleming correctly in this case. He has fallen into the error unintentionally, of course. For instance, the first complaint is, that His Honor erred in allowing the evidence of Canaan Young to go to the Jury for the purpose of showing that any division had been made by the heirs of the estate of James Charles Anthony Desverges, without administration; and he cited the case of *Turk, in 3d Kelly*, as direct authority to this point. He omits, however, to state the reason assigned by the Court for overruling the objection to this testimony. It was not because a distribution of the estate by the heirs, who were *sui juris*, was a bar at Common Law to an action brought by an administrator. The Court nowhere decides this; and hence, there is no conflict between this case and the rule laid down in *Turk's* case. But the Court overruled the plaintiff's objection, holding: "That after the lapse of twenty-seven years, an administration would be presumed, and that such a defense was a good defense in this suit." And we think it undoubtedly is, without invoking the aid of the decision in *27th Geo.*, which, for myself, I believe to be good Law.

As to the complaint in permitting the division of the property to be proven by hear-say, we would ask: Is there any question that a division was made? Do not the plaintiff's witnesses establish the fact?—I mean a division *de facto*—whether *de jure* or not, is another thing. Mrs. Margaret Heald, the mother of the plaintiff, testifies that Mrs. Wallace divided the land and negroes, leaving out Hetty, and appropriating her to herself, and that James M. Desverges used his utmost influence to prevent it; who told his mother, Mrs. Wallace, when she took the girl into her possession, that she belonged to the estate of his father. Still, the fact is not denied, that a division of the land and negroes was made. As to the hear-say testimony then, if it be such,

Desverges vs. Desverges.

we deem it wholly immaterial in this case. It is in proof by the plaintiff, that James M., the father of the plaintiff, went so far as to consult counsel how he should proceed in the business. Why talk, then, about the manner of proving that the property was actually divided into three parts? Whether into equal and just proportions, does not appear; nor is it necessary that it should, so far as the points in this case are involved.

Another error assigned is: That the Court charged the Jury, that if they found that division had been made, although at the time one of the heirs was not consenting to a division, but subsequently took the part that was allotted to him, whether an equal portion or not, his taking of such portion would be a waiver of his objection to the division, and would make it good.

We hold this, too, to be sound Law; and that the letter written by James to his brother John, the defendant, and dated April 1st, 1834, furnishes the strongest possible evidence, not only that a division had been made, but that he acquiesced in it. The preservation of this letter seems almost to be Providential. It is proof in writing, under the hand of the father of the plaintiff, and would be difficult to overcome. It shows more, namely: That the division had not disturbed at all the family relations. Affectionate reference is made to the very mother who is charged to have acted unjustly in the matter of the division. And this is the last that we hear from this son and brother, until he disappears entirely from the toilsome strife of sublunary care. His remains have rested in peace for nearly thirty years. Let them not be disturbed until the trump of the Archangel shall sound!

JUDGMENT.

Whereupon, it is considered and adjudged by the Court that the Judgment of the Court below be affirmed.

REPORTER'S NOTE.

THERE are three cases in this Volume, in which there was a dissenting Judgment, a note of which should have been made, along with a report of the cases, but which was omitted.

Mr. Justice JENKINS dissented from a majority of the Court in the following cases :

Dennis *vs.* Sharman *et al.*,.....607
Howell *vs.* Lawrenceville Manufacturing Company,....668

Mr. Justice LYON dissented in the following case:

Strozier *vs.* Carroll,557



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ACTION.

1. The owner of property out of possession, can only recover in an action of Trespass, for an injury done to the reversion. *Johnson et al. vs. Lovett*..... 187

ADMINISTRATION.

1. A person dying intestate, and leaving, as his sole heir at law, an infant child, no collateral relative of that child has a legal right, by reason of such relationship, to administration on the estate of the intestate. The legal right is in the infant. *Watson vs. Warnock*..... 694
2. In a contest for administration in such a case between two collateral kinsmen of the infant, before the Superior Court, on appeal from the Ordinary, a judgment of the Superior Court between the same parties in a contest for the guardianship of the infant, awarding the guardianship to one of them, is admissible as evidence, to aid the Jury in the proper exercise of their discretion, and it is not error in the Court to charge the Jury that they should consider that judgment in making their verdict. *Ibid*.
3. To protect a voluntary division made by the distributees of an estate who are at the time all *sui juris*, after the lapse of twenty or thirty years, an administration will be presumed. *Desverges vs. Desverges*..... 753

AMENDMENT.

1. Where the signing of the declaration is imperfect, it is curable, even under the Act of 1818, provided there be a good cause of action set out in the declaration. The time for such trifling is past. *Tatum et al. vs. Allison, Anderson & Co*..... 337

2. A declaration in favor of a Sheriff, against a purchaser at Sheriff's sale, may be amended, so as to include as usees in the action the names of plaintiffs in execution, which were omitted by accident or mistake. *Glenn vs. Black et al.* . . . 393

See Practice, 5.

ANCIENT DOCUMENTS.

See Deeds, 1.

APPEALS.

1. When a party, desiring to appeal, pays the costs, tenders security, and demands an appeal from the Clerk during the Term at which the judgment was rendered, and the appeal be not entered, from the fault of the Clerk, the Court, on application, will order the appeal to be entered *nunc pro tunc*.
Holt vs. Elmonson 357
2. A party not appealing from a first verdict, is bound by it.
Pierce vs. Chapman et al. 674

ARBITRAMENT AND AWARD.

1. A case stated, in which it was *Held*,
1. That a bill of review did not lie to correct the errors of the award or judgment.
2. That the attorney and solicitors of complainant had power to make the reference under the sanction of the Court, without the consent of complainant.
3. It was not error in the arbitrators to settle the accounts between the defendant and husband of complainant, especially as such settlement inured to the benefit of complainant.
4. That it was no error for the next friend of complainant to sign and agree to said submission, and that he did so, only made it the more perfect.
5. In arbitrations, other than those provided for by the arbitration Act of 1856, the rule prescribed by that Act, that the arbitrators may settle compensation for their services, may be adopted by the Court as a proper rule in like cases.
6. It was no error in the arbitrators in the case to pay off the balance due to defendant with the negroes on which the advances and debts were contracted, or to allow a credit for the hire of complainant's negroes, when complainant has received the corresponding benefit from the advances made and the surplus left.

7. It is not compound interest to add interest on the balance up to the credit and deduct the credit from the sum of principal and interest, and then to add interest on balance, &c., when the credit exceeds the interest, &c.; but such rule is the one prescribed by the Statute.

8. As the arbitration was not under the arbitration Act of 1856, it was not error not to furnish the parties with copies of the award.

9. The children of complainant having no interest in the matters in arbitration, it was not necessary that they should be parties, nor have their interest been affected by the award.

10. There was no error in allowing defendant and the husband of complainant to be sworn as witnesses in the arbitration, neither having sworn to anything untrue, or prejudicial to complainant.

11. The award being in the highest degree beneficial to complainant, ought not to be disturbed. *Wade vs. Powell*..... 1

2. S. and H. agreed to submit matters in litigation between them to the arbitration of certain persons named, who, "as arbitrators, should settle, adjudicate and pass upon the aforesaid several matters in controversy, under the provisions and regulations of an Act, entitled, an Act to authorize persons to submit controversies to arbitration," approved March 5th, 1856: *Held*, that the award, to be good, must be unanimous, notwithstanding the arbitration was not had until after the passage of the amendatory Act of 12th of December, 1859, making the agreement of two of the arbitrators to the award, under that Act, sufficient.

Hopper vs. Stephens..... 589

ATTORNEYS.

1. An attorney or solicitor of a party may, under the sanction of the Court, refer a cause to arbitration, without his client's consent. *Wade vs. Powell*..... 2

2. A writ may be signed by an attorney in fact of the plaintiff. *Tatum et al. vs. Allison, Anderson & Co*..... 337

See Witnesses, 1. *Continuance* 1.

BAILMENTS.

1. The defendant hired from the plaintiff a horse to perform a journey. While he had as yet performed but a small part of the journey, the horse was discovered to be sick. De-

defendant's attention was called to the condition of the horse, who continued his journey, and at the end, the horse died : *Held*, that defendant is liable to the plaintiff.

Thompson vs. Harlow..... 348

BANKS AND BANKING.

1. The charter of a bank, granted by Act of the General Assembly of Georgia, is a public Act, and Courts must take judicial cognizance of it, in all cases, without having been specially given in evidence.
Davis et al. vs. Bank of Fulton..... 69
2. Where a clause in a bank charter authorizes the joining in one action of all parties to a note or bill given to be negotiated, or actually negotiated in that bank, such joinder is proper. *Ibid*.
3. Such a clause in a bank charter is not unconstitutional, be cause not expressly recited in the title of the Act of corporation. *Ibid*.
4. By the 9th section of the charter of the Planters' & Mechanics' Bank of Dalton, it is declared that "the bills obligatory and of credit, notes and other contracts whatever, in behalf of said corporation, shall be binding upon the said Company : Provided the same be signed by the President and countersigned by the Cashier of said corporation ; and the funds of said corporation shall in no case be liable for any contract or engagement whatever, unless the same be signed and countersigned as aforesaid:" *Held*, that bank-bills, signed by a Vice-President, and countersigned by an Assistant Cashier, there being a regular President and Cashier in office at the time, discharging their respective duties, are not binding on the corporation.
Planters' & Mechanics' Bank of Dalton vs. Erwin..... 371

CAPACITY TO CONTRACT.

1. Mere weakness of mind, if the person be legally *compos mentis*, is no ground for setting aside a contract.
Maddox vs. Simmons & Griffin..... 512
2. The Law, in fixing the standard of legal competency to contract, has taken a low standard of capacity. *Ibid*.
3. Imbecility and eccentricity of mind not the same. *Ibid*.

CASA BOND.

1. If the officer arresting a defendant in *ca. sa.* take bond for his appearance at the Court to which the *ca. sa.* is returnable, on a certain day, which is not the day appointed for the sitting of the Court, and the defendant appear on the day designated in the bond, but after the time appointed for the holding of the Court, and after its adjournment, the security is not responsible. It is the mistake of the arresting officer. *Roberts vs. Green*..... 421

CERTIFICATE.

1. An application for a certificate, to prevent damages being assessed under the Act of 1845, creating the Supreme Court, must be made during the Term at which the judgment was rendered. *Goodwyn vs. Goodwyn*..... 265
2. The party may apply in advance of the decision, and the proper time for doing this is when the case is argued. *Ibid.*

CHARGE OF THE COURT.

1. It is not error in the Court to charge the Jury, on request, that when a witness testifies to facts, incoherently or inconsistently, that circumstance goes to his credit, and if his testimony be very incoherent or inconsistent, it should be considered with great caution. *Evans et al. vs. Lipscomb et al.*..... 71
2. It is not error in the Court to express its opinion as to the grade of the offense made by the case, provided it is not done in the way of *direction*; and the omission or refusal of the Court to charge the Jury upon a grade of homicide not authorized by the pleadings and proof, is not error. *Choice vs. The State*..... 424
3. When S. sells land for another, and is himself, together with the attorneys of the principal, the principal purchasers of the lands at such sale, and when also such agent and attorneys take an undue advantage or interest from such sales: *Held*, that it is no error in the Court, on the trial of suit brought for the recovery of the lands, to charge the Jury that plaintiffs were not bound by that sale if there was any fraud in it; at least, the facts would warrant this charge. *Kellam vs. Doe & Allen et al.*..... 544

4. It is not error in the Court, after having charged the Jury as to a presumption arising under a given state of facts, not amounting to positive proof of the thing presumed, to add, "but this presumption is not conclusive. It may be rebutted by evidence, and it is for you to determine whether or not it has been rebutted." *Black et al. vs. Thornton*..... 641
5. It is not error in the Court to charge the Jury, "that if they believe one of the witnesses sworn was called on by the parties at the time of the transaction, to bear witness to it, or was deliberately consulted by them, such circumstances are to be considered by the Jury in favor of giving special weight to his evidence; but such circumstances are not conclusive: they may be overborne in the minds of the Jury by others." *Ibid*.

See Error, 2. Railroads, 1.

CITY ORDINANCE.

1. Under an ordinance of a municipal corporation, providing for the collection of taxes, in the following words: "It shall be the duty of the collector and treasurer to give notice, in one or more of the gazettes of the city, and to call at least once at the house of each person taxed, to demand the taxes; and unless said taxes be paid within two months from the date of said notice, it shall be his duty to make a return of such defaulters to the City Council, and thereupon executions shall issue against the goods or persons of such defaulters." And further: "At the regular time for returning defaulters on the Digest, the collector and treasurer shall become liable for the amount of the Digest, after deducting the sum for which defaulters are liable; and he shall be liable for the amount of all executions, not satisfied, which may remain in his hands at the expiration of his term of service, unless he shall, within ten days thereafter, deliver them to the Clerk of the Council:" *Held*, that a call at the house of the taxpayer to demand his taxes, and a return of him as a defaulter, are prerequisites to the issue of execution, and that the former must be made within two months after notice in the gazette, and the latter within the said collector's term of office, to authorize the issue of execution as provided in the ordinance.

D'Antignac vs. The City Council of Augusta..... 700

CONSIDERATION.

1. In the absence of fraud or deception, the Court will rarely set aside a contract on account of inadequacy of consideration; though gross inadequacy may be looked to as an evidence of imposition. *Maddox vs. Simmons & Griffin*.... 512
2. It may be well said, that in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract. *Ibid.*

CONSTITUTIONAL LAW.

See Banks and Banking, 2, 3.

CONTINUANCE.

1. The absence of counsel in attendance on the Legislature, and as a member thereof, is not a good ground of continuance. *Sharman vs. Morton*..... 35

CONTRACT.

1. A. purchased from B. certain hides, in vats, at a stipulated price per hide, and of an assumed number, with the understanding that there should be a count made of them, and if they fell short of the number assumed, B. should account to, or pay A. for the number deficient, at the price fixed. A count being made, the number was found deficient. A. raised an account against B. for such deficiency, in accordance with the agreement, amounting to \$51 00. To a suit afterwards brought by B. against A., on a note, A. pleaded, first, failure of consideration, in that the note sued on was given in part consideration of the hides, setting out the agreement and the ascertained deficiency. He also pleaded his account, so raised against B., as a set-off. The proof of the consideration of the note was not clear; but the sale of the hides, the agreement, and deficiency, as stated, were clearly proven: *Held*, that A. was entitled to the allowance of his demand, under one plea or the other. *Daniel & Johnson vs. Trice*..... 162
2. When the plaintiffs resided in New York, the makers of certain notes in the State of Georgia, and the notes were indorsed by defendants, to an agent of the plaintiffs, in the State of Tennessee: *Held*, that the contract was to be per-

formed in the State of Georgia, and the contract, as to its nature, validity, construction and obligation, was to be governed by the laws of Georgia, and not of Tennessee.

Vanzant, Jones & Co. vs. Arnold, Hamilton & Johnson . . . 210

3. A verbal contract made on the 14th December, 1856, for the rent of house and lot, for the year 1857, is an agreement not to be performed within the space of one year from the making thereof, and, therefore, void under the Statute of Frauds, &c. *Atwood vs. Norton*..... 507
4. If a contract be made with one in his individual right, and on his own security, such person is alone liable on that contract, although a partnership existed that received the entire benefit of the contract, of which such contracting party was a member. *Floyd vs. Wallace*..... 688
5. Mere weakness of mind, if the person be legally *compos mentis*, is no ground for setting aside a contract. *Maddox vs. Simmons & Griffin*..... 512
6. The Law, in fixing the standard of legal competency to contract, has taken a low standard of capacity. *Ibid.*

See Georgia Military Institute, 1.

CRIMINAL LAW.

1. When the circumstances are such as to excite the fears of a reasonable man, in the absence of all other proof to the contrary, the Law will attribute the killing to these fears, and not to revenge or passion. *Aaron vs. The State*..... 167
2. When a homicide is committed with a deadly weapon, and the slayer is indicted for murder, it is competent for him to prove that he came by the weapon accidentally, or for an innocent purpose, on the occasion. *Ibid.*
3. It is justifiable homicide to kill one who intends, by violence, to commit a felony upon the person of another. *Ibid.*
4. It is not the name given to it, in a bill of indictment, but the *description*, that characterizes the offense. *O'Halloran vs. The State*..... 206
5. It is neither legally or morally wrong for persons to combine to detect an offense. *Ibid.*

6. The furnishing of liquor to slaves is a crime which, in its consequences, is one of the most mischievous in the Code. *Ibid.*
7. An involuntary killing happening in the commission of an unlawful act, which, in its consequences, naturally tend to destroy the life of a human being, or if committed in the prosecution of a riotous intent, or of a crime punishable by death or imprisonment in the Penitentiary, shall be deemed and adjudged to be murder. Nor can the offense be excused or mitigated by proof that the accused had no ill-will or actual malice toward the deceased.
McGinnis vs. The State..... 236
8. If a defendant, on trial for stabbing, give in evidence a previous difficulty or quarrel on the same day, to show a conspiracy of several to do him bodily harm, it is competent for the State to prove other incidents of the same previous difficulty, to the end that the Jury may the better understand the merits of the case. *McAfee vs. The State*... 411
9. In such a case it is no objection to the competency of a witness, on the part of the State, or to his testimony, that he is one of the parties charged with conspiracy, and that his testimony tends to exculpate himself, if it rebut the conspiracy attempted to be proven. *Ibid.*
10. Under an indictment for stabbing, if the evidence show that the prosecutor and defendant agreed to fight—the prosecutor being entirely unarmed, and the defendant commenced from the first to use a knife, stabbing the prosecutor at every blow—it is not a case of self-defense, and a verdict of guilty is sustained by the law and the evidence. *Ibid.*
11. C. is indicted for murder. The plea of insanity is interposed: *Held*, that it is not competent to prove, by a subsequent conversation with the prisoner, that he was insane at the time the homicide was committed. Neither is it allowable to give in evidence the tests that were applied during that interview in order to test prisoner's sanity at the time the act was done. *Choice vs. The State*..... 424
12. The State having proved the homicide, from which the Law infers malice, closed. The defendant pleads insanity, and supports his plea by proof. The State may, by leave of the Court, then offer evidence of express malice. *Ibid.*

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13. Witnesses other than experts may give their opinions as to sanity or insanity, provided they be accompanied by the facts upon which they were founded. Nor is it wrong for witnesses to state that the prisoner "appeared to be drinking." *Ibid.*
 14. The Court is not obliged to have the testimony taken down at the trial, read over to medical witnesses to enable them to express an opinion relative to the sanity or insanity of the accused. The proper course is, to ask their opinion upon the facts, hypothetically stated. *Ibid.*
 15. It is not error in the Court to express its opinion as to the grade of the offense made by the case, provided it is not done in the way of *direction*; and the omission or refusal of the Court to charge the Jury upon a grade of homicide not authorized by the pleadings and proof, is not error. *Ibid.*
 16. Family and neighborhood reputation is not admissible to prove that the prisoner was permanently injured in his mind by reason of an injury which he had received. *Ibid.*
 17. If the condition of a man's mind, when unexcited by liquor, is capable of distinguishing between right and wrong, reasoning and acting rationally, and he voluntarily deprives himself of reason by intoxication, and commits an offense while in that condition, he is criminally responsible for it. *Ibid.*
 18. "Nor does it make any difference that a man, either by former injury to the head or brain, or constitutional infirmity, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts while in that condition. But if a man be insane when sober, the fact that he increased the insanity by the super-added excitement of liquor, makes no difference. An insane man is irresponsible, whether drunk or sober. *Ibid.*
 19. The disease called *oinomania* questioned. *Ibid.*
 20. An inordinate thirst for liquor, produced by the habit of drinking, is no excuse, legally or morally, for the consequences resulting from the indulgence of such appetite. *Ibid.*

21. Moral insanity, or irresponsibility for crime, from an inability to control the will, from the habit of indulgence, controverted. *Ibid.*
22. This doctrine has no foundation in the Law, and the consciousness and conscience of mankind have in all ages been opposed to it. *Ibid.*
23. If a man has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act in question; if he has knowledge and consciousness that the act he is doing is wrong, and would deserve punishment, he is, in the eye of the Law, of sound mind and memory," and the subject of punishment. *Ibid.*
24. The opinions of experts is competent testimony; and when the experience, honesty and impartiality of the witnesses are undoubted, their testimony is entitled to great weight and consideration. Not that it is so authoritative that the Jury are bound to be governed by it: it is intended to aid them in coming to a correct conclusion in the case. *Ibid.*
25. Where the verdict is fully sustained by the testimony, and the law of the case has been correctly administered, this Court will not disturb the finding and judgment, especially in a criminal case. *Ibid.*

COURTS.

1. The law providing that the Superior Court for any county shall be holden on the fourth Monday in April, and the first Monday in May, if it occur that there are five Mondays in April, the Court may be holden during the week intervening between those commencing on the fourth Monday in April and the first Monday in May, without violation of Law. *McAfee vs. The State*..... 411

DAMAGES.

See Action, 1. Certificate, 1. New Trial, 8.

DEBTOR AND CREDITOR.

1. When two are liable, and the creditor takes the note of one, extending the time of payment, the other is thereby discharged from liability. *Mosely et al. vs. Floyd et al.*..... 564

DEEDS.

1. A deed for land more than thirty years old, found in the proper custody, accompanying other deeds, together constituting a chain of title, and free from all suspicious appearances, is admissible in evidence without proof of execution. *Doe ex dem Dooly vs. Roe & McCurley*..... 593
2. A husband and father in the possession of slaves, executed an instrument under seal, in consideration of natural love and affection, to his wife for life, and after her death, to her children, using these words: "I, B. J., do give, grant and convey," (certain slaves by name.) In the next clause these words occur: "To have and to hold, *after my death*, the aforesaid property," &c.: *Held*, that in the first clause there is a clear gift in presenti; that the words, "*after my death*," in the *habendum*, may be construed into a postponement of possession and enjoyment by the donees until the donor's death, or a reservation of an estate for his life, and thus reconciled with the prior gift in presenti; that if the two clauses conflict, the first must prevail; and that in either view, the instrument is a deed, and not a testamentary paper. *Johnson vs. Hines*..... 720
See Title, 3.

DEVISE AND LEGACY.

1. Testator, by his Will, gave to his wife, for life, the plantation whereon he lived, and a tract of land adjoining, and fifty negroes, to be selected by her from all his negroes: provisions enough for one year's support; a sufficient number of mules, horses, hogs, cattle, wagons, household and kitchen furniture necessary to keep up said farm, and after her death, to be divided between his daughter and her children. All the balance of his estate of lands, negroes, money, choses-in-action, and everything else left after the payment of debts, legacies and provisions made for his wife, he gave to his daughter for life, and at her death, to be equally divided among her children. The executor kept up the farm and business of testator, in the condition in which he left it, for the year after testator's death. On a bill filed by the executor for instruction as to disposition of the income of that year, there being debts: *Held*,
 1. That the bequest to the widow was specific, and that the widow was entitled to that part of the income which grew out of the employment of her part of the estate, under the Will, in its production from the death of testator.

2. That the daughter, under the residuary clause, was entitled to the clear residuum after the payment of debts and legacies from the estate, as left by the testator, and the income on such residuum from the death of the testator.

Rachels and wife et al. vs. Wimbish 214

2. John W. Allen, by the tenth item of his Will, directed certain slaves to be manumitted, which clause was declared void. By the twelfth item of his Will, he "desires all the remaining portion of his property, consisting of household and kitchen furniture, crop, provisions, cotton, stock of all kinds, lands, and the following named negroes to be sold, to-wit: Jim, Niner, Dave, Katy, Aaron, Jerry, Moses, Jim, Mike, and all other property belonging to me and not heretofore specified, and the proceeds of such sale to be appropriated to the payment of all my debts; and if there should be anything remaining after all my debts are paid, it shall belong to the children of Theophilus D. Boothe, in the manner specified in the eighth item of this Will:" *Held*, that the negroes specified in the tenth item of the testator's Will—the same being void by the laws of this State—belongs to the heirs at Law of John W. Allen, the testator, and not to the children of Theophilus D. Boothe, as residuary legatees under the twelfth item of the Will.

Hughes et al. vs. Allen..... 483

3. A. R., by his last Will, amongst other bequests, gave all the rest of his property to his wife, E. R., for and during her natural life, and after her death, to descend to the heirs of her body, to hold to the said heirs of her body, *share and share alike, and to their heirs and assigns forever*; but if his wife should *die without issue*, then the said property to be rented and hired to the best advantage; and out of the first rents received, he gave five hundred dollars to his brother's widow, the sister of his wife; and the remainder, when collected, to be appropriated and applied towards the maintenance and support of two of his brother's children (naming them) while they are under age, and unmarried; but as soon as the last of said children shall become of age, or marry, the testator directed that all his property descend to all his said two brothers' children, who may then be alive, to be equally divided between them, *share and share alike*; to hold to them respectively, their heirs and assigns forever. He nominated his wife executrix, and his dear and trusty friend, J. T. R., executor of his Will, giving and granting to them "all my full power and authority

to execute the same, according to the true intent and meaning thereof:" *Held*,

1. That E. R., the wife of testator, took an estate for life only, and that her heirs, had she left any, would have taken as purchasers.

2. That the limitation over was good, not being upon an indefinite failure of issue of E. R., but of heirs, at the time of her death.

3. That the limitation over was not obnoxious to the rule against perpetuities. *Lillibridge vs. Ross*..... 730

DISCOVERY AT LAW.

See Practice, 2.

DIVORCE.

1. Where a citizen of this State files a Libel for Divorce against a non-resident defendant, service may be made by publication; and if the defendant appears by attorney, and without pleading to the jurisdiction of the Court, files a plea of the general issue, and a special plea to the merits, the jurisdiction of the Court is complete, and the judgment will be valid and binding to all intents and purposes whatsoever. *Stundridge vs. Stundridge*..... 223

2. The grounds of Divorce are regulated by the *lex fori*. *Ibid*.

4. Law of Divorce, as to certain questions, expounded. *Gholston vs. Gholston*..... 626

DOWER.

1. The husband died in 1849. His widow made application for dower in land, of which he died seized, in 1859: *Held*, that her right was barred by the Statute of Limitations. *Doyal et al. vs. Doyal et al.*..... 193

DRUNKENNESS.

1. An inordinate thirst for liquor, produced by the habit of drinking, is no excuse, legally or morally, for the consequences resulting from the indulgence of such appetite. *Choice vs. The State*..... 424

ELECTION.

1. A testator, by his Will, left, amongst other things, certain property in the possession of his son-in-law to his daughter and her children. One share of the residue of his estate, not disposed of by his Will, he directed to be settled in trust upon his daughter and her children. The son-in-law was appointed trustee, and filed his bill to recover his wife and children's share of the residue. The executors resisted a recovery, unless he would declare, in writing, that he held the property mentioned in the fifth item, and in his possession at the death of the testator, as a part of the trust estate of his wife and children: *Held*, that the Will did not make a case for election. *Horton et al. vs. Mercier et al.*..... 225

EQUITY.

1. A demand once barred by the Statute of Limitations, and afterwards revived by a new promise, cannot be pleaded at Law as a set-off to an action commenced during the existence of the statutory bar. *Lee vs. Lee*..... 26
5. The defendant, in an action at Law, cannot plead, as a set-off to plaintiff's demand, a judgment existing against plaintiff, unless defendant had a legal title to that judgment when the action was commenced, even though he may then have had an equitable interest in it. *Ibid.*
3. In either case above specified, where there are peculiar equities between the parties, such as that the indebtedness of the defendant at Law was created with reference to his demand against the plaintiff, and with the understanding that they should be included in a future settlement, and that plaintiff at Law is insolvent, Equity will relieve the defendant by enjoining the action at Law, and taking cognizance of the matters in controversy. *Ibid.*
4. Equity will not, by injunction *pendente lite*, restrain a party in possession of property, purchased from one in peaceable possession, under a sheriff's sale, in the use and enjoyment of that property, at the suit of a purchaser of the same property, from another, claiming adversely to the first vendor; complainant and defendant each having been ignorant at the time of his purchase of any title adverse to that of his vendor. *Kelly & Mitchell vs. Morris et al.*..... 54

5. Although the Court, in decreeing a settlement on the wife, duly attends to the interests of the children, and gives them an interest in the property, (provided the wife's estate therein does not cease at her death,) yet it does so only on the assumption that the wife is anxious to provide for her children. *Hobgood vs. Martin*..... 62
6. Children have no independent equity of their own; their claim to the consideration of the Court is capable of being either expressly given up by the wife, or tacitly waived by her death, without having asserted it. *Ibid.*
7. The right of the children attaches on the wife's instituting proceedings for a settlement; and therefore, if she should die while such are pending, without expressly waiving her right, the children are permitted to enforce their claim by a supplemental bill. *Ibid.*
8. Where the defendant has fully denied all the equity of the bill, is solvent and able to respond to any duty or damages which may be imposed, and there is nothing peculiar in the facts of the case, this Court will not overrule the discretion of the Circuit Judge in dissolving the injunction *Rainey vs. Jones*..... 111
9. A decree in Equity is the judgment or sentence in a proceeding instituted in that Court, and no other is necessary. *Loyd, Perryman & Mills vs. Hicks*..... 140
10. A decree rendered against a partnership is good, although in the decree the name of the partners are transposed in the firm-name. *Ibid.*
11. Courts of Equity more readily raise and act upon a presumption of fraud, from facts proven, than do Courts of Law. *Ward et al. vs. Lamberth*..... 150
12. A. purchased a tract of land at Sheriff's sale, at a price much below its value, under an agreement with B. (the defendant in execution,) that he would hold the land for the benefit of B., or of B. and his family, and that the latter should, as he might be able, refund the purchase money, with interest. A. afterwards executed a bond for titles to said land, to C., a minor son of B.—C. having knowledge of the original agreement. B. repaid part of the purchase money, and remained in possession of the land until his

- death, ten years after the Sheriff's sale. D., a creditor of B., whose debt existed before the purchase by A., filed his bill to set aside A.'s deed, and C.'s bond for titles, and for a re-sale of the property for his benefit. Decreed accordingly, with a proviso that the balance of purchase money due A., with interest, be first paid from the proceeds of the re-sale: *Held*, that the decree was right. *Ibid*.
13. Where a judgment at Law is had in an action of Trover, for negroes, by one who has not the true title, and afterwards administration is taken upon the estate of a deceased person in whom is the true title, and both the plaintiff and defendant, in first suit, are, without the subject of the suit, unable to respond to a recovery, a Court of Equity, upon the application of the administrator of the true owner of the property, will enjoin both plaintiff and defendant, in the trover suit, from the settlement and enforcement of the judgment—not only for the protection of the property from loss, but to protect the defendant in the first suit from two separate demands for the same subject.
Sims et al. vs. Goodwyn et al...... 267
14. Where a son-in-law executes a deed to his father-in-law, to a lot of land, and at the same time releases a debt to him, provided he will convey the title in trust to the wife and children of the grantor, and to enable him to do so, Equity will either enforce a specific performance of the agreement—it not being denied by the grantor—or decree a resulting trust to the land in favor of the grantor.
McKinney et ul. vs. Burns et al...... 295
15. One cannot, by his answer, charge and discharge himself.
Laub et al. vs. Burnett et al...... 304
16. An order in Chancery was had, authorizing the husband and trustee to sell certain real estate, belonging to the separate estate of the wife. The wife afterwards becoming opposed to the sale, defendant advised her to file a bill to enjoin the husband from such sale, and consented to act as her trustee or *procliem ami*, in that proceeding, and counsel was employed to file such a bill. The defendant subsequently bought the property from the husband, and paid him the money, and, being about to dispossess the wife, &c., she applied for, and obtained, an injunction, restraining him from disturbing her possession, &c. On the coming in of the answer of defendant, admitting these facts, the injunction was

dissolved : *Held*, that this was error ; the injunction ought to have been retained. *Ibid*.

17. New matter, not in response to the allegations in the bill, cannot be considered in an application to dissolve an injunction, especially when such new matter is immaterial. *Ibid*.
18. An injunction will be refused on the coming in of the answer, if the equities are fully denied. *Cross vs. Payne*... 342
19. Where parties are already in a Court of Equity, and the remedy at Law is not likely to afford full, adequate and complete relief, they will not be driven into another forum. *Conyers vs. Bowen*..... 382
20. There being an action at Law, pending on the appeal, and a bill in Equity, filed by the defendant at Law, against the plaintiff, seeking relief, touching the same subject matter, and a consent, in writing, by the parties that both cases be tried at the same time, the complainant, at a Term of the Court when the cases stood for trial, amended his bill, and asked an injunction of the action at Law, until the coming in of the plaintiff's answer to the amended bill, whilst the plaintiff at Law insisted upon a trial. The presiding Judge, in his discretion, ordered a verdict to be taken, and judgment entered, in the action at Law, and that further proceeding, under that judgment, be enjoined, until the coming in of the answer to the amended bill, and the further order of the Court ; and judgment was accordingly entered during the Term in the action at Law. Under such circumstances, this Court will not partially disturb the discretion of the Court below, by reversing so much of its judgment as imposes the injunction. *Doyle vs. Lyons*..... 495
21. In cases where imbecility of mind and inadequacy of consideration unite—especially where these are united with an abuse of confidence which the one party reposed in the other—the Court has granted relief without other evidence of imposition. *Maddox vs. Simmons & Griffin*..... 515
22. In the absence of fraud or deception, the Court will rarely set aside a contract on account of inadequacy of consideration ; though gross inadequacy may be looked to as an evidence of imposition. *Ibid*.

23. It may be well said, that in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract. *Ibid.*
24. Equity will not decree the reformation of a deed of gift of a slave, so as to make it conform to the intentions of the donor, if it appear from the evidence that an unconditional parol gift had been made by the donor, to the donee, long anterior to the execution of the deed; that the property had been in the possession of the donee continuously, from the time of the parol gift, and that the donee had never accepted the deed sought to be reformed.
Denson et al. vs. McLeroy et al...... 536
25. Verdict to reform a deed, and change the possession of property, conformably to such reformation, under such a state of facts, set aside and a new trial ordered. *Ibid.*
26. A marriage settlement having been in the lives of the parties to it, reformed, by consent, between themselves and the trustees, so as to vest the property absolutely in the husband upon the death of the wife, without issue of the marriage surviving her: *Held*, that the decree so reforming the marriage settlement was good against such persons as would have been heirs at Law of the settlor, had she died at the time the settlement was executed, even though they were not parties to the bill by which the settlement was reformed. *King and wife vs. Dunham et al.*..... 743

See Arbitrament and Award, 1. Husband and Wife, 1.

EQUITY PLEADING.

1. Stubbs' Act of 1857 to simplify Equity Pleadings, construed. *Horton et al. vs. Mercier et al.*..... 225

See Equity, 7.

EQUITY PRACTICE.

1. Where a suit is instituted at Law, and the proceeding at Law is enjoined by bill, which seeks both discovery and relief, when the Equity cause is reached in its order and called for trial, it is error in the Court to dissolve the injunction and direct the Common Law action to proceed; especially if a motion had been made at a previous stage of the litigation.

- tion to dissolve the injunction and rightfully refused, and there having been no change in the pleadings in the meantime. *Ford vs. Buchanan*..... 396
2. The Court is not bound to decree a specific performance in any case, where it would not set aside the contract, nor to set aside any contract that it would not order to be specifically performed. *Maddox vs. Simmons & Griffin*..... 512
3. New matter, not responsive to the allegations of the bill, cannot be considered in an application to dissolve an injunction, especially when the new matter is immaterial. *Laub et al. vs. Burnett et al.*..... 304

ERROR.

1. On the trial of an action for malicious prosecution, (Arson being the criminal charge,) it was not error in the Court to permit the defendant to prove that the plaintiff had threatened to destroy the house, for the burning of which plaintiff had been prosecuted, without first proving that defendant had been informed of such before he commenced the prosecution. *Goggans vs. Monroe*..... 331
2. Defendant's counsel, on the trial, having argued to the Jury that plaintiff's character was bad, it was error in the Court to refuse to charge, on request, that the Law presumes the character of a party to be good until the contrary is proven. *Ibid.*
3. In an action on the case for malicious prosecution, where there is evidence of express malice—an *alibi* proven by the plaintiff—evidence that the prosecutor had been informed, before he commenced the criminal prosecution, that proof of the *alibi* existed—an actual arrest of plaintiff and restraint of his personal liberty—a bill preferred charging him with a felony, and a return of “no bill and malicious prosecution”—a verdict for defendant is contrary to Law and evidence, and it is error in the Court to refuse a new trial. *Ibid.*
4. Where a material alteration is made in an instrument, in a different hand-writing from that in which it is written, and a plea of *non est factum* is filed, it is error to instruct the Jury, in such a case, that the Law presumes the alteration was made at the time the instrument was executed. The

Law presumes nothing in such a case, but leaves the whole question to be passed upon by the Jury.

Planters' & Mechanics' Bank of Dalton vs. Erwin..... 731

5. To discharge securities to a note, by giving indulgence to the principal, it is necessary that the creditor should know the character in which the parties signed the paper. And it is error in the Court to assume that this fact has been proven, when there is a conflict of testimony upon the subject. *Howell vs. Lawrenceville Manufacturing Co.*..... 663

See Charge of the Court, 1, 2, 3, 4, 5. *Railroads*, 1.

Practice, 9.

EVIDENCE.

1. Where unchastity is imputed to a female, evidence of actual prostitution, two months after the speaking of the words, is not admissible. *Beggarly vs. Craft*..... 309
2. In a suit by the Sheriff for the use of the plaintiff in execution, against a purchaser at Sheriff's sale, under the Act of the 27th December, 1831, (*Cobb's Dig.*, 513,) the execution under which the sale was made must be introduced in evidence, or its absence satisfactorily accounted for; and if neither put in evidence nor accounted for, a verdict for plaintiff would be without sufficient evidence to support it. *Glenn vs. Black et al.*..... 393
3. The *fi. fas.* in favor of the usees, named in the declaration, against the defendant whose property was sold, are proper evidence in the cause to show their interest. *Ibid.*
4. The declarations, admissions and promises made by an executor or administrator, after being clothed with his fiduciary character, are admissible against the estate in any suit by or against the representative in that character. *Floyd vs. Lawson vs. Powell*..... 681
5. It is competent to put in evidence outside statements of a witness for the purpose of impeaching him, a proper foundation first being laid for their introduction. *Wallace*..... 668
6. An order of the Court of Ordinary, granting leave to defendant to sell the timber for which the suit is brought, is admissible as evidence on the trial of the suit. *Ibid.*

7. Admissions by the administrator, admissible to charge the assets of intestate in his hands. *Ibid.*
 8. In a contest for administration on the estate of an intestate, whose sole heir at Law is an infant, pending on appeal before the Superior Court, between two collateral kinsmen of the infant, a judgment of said Court between the same parties in a contest for the guardianship of the infant, awarding the guardianship to one of them, is admissible as evidence, to aid the Jury in the proper exercise of their discretion in rendering a proper verdict. *Watson vs. Warnock.* 694
 9. Whether, in such a case, the granting a *supercedeas* would render the judgment superceded, inadmissible? *Query. Ibid.*
- See Criminal Law,* 2, 8, 11, 12, 13, 16, 24. *Error,* 1. *Notice,* 4. *Partners and Partnerships,* 2, 3, 5. *Sale,* 4.

EXECUTION.

1. In a claim case, an entry that a previous levy was dismissed, by order of the plaintiff, sufficiently accounts for the levy. The entry might require some explanation in a contest between a third person as a security, for instance, and the plaintiff in *fi. fa.* *Hardwick & Smith vs. Whitfield.* 684

EXECUTORS AND ADMINISTRATORS.

1. A suggestion as to a proper construction of the Act of 15th January, 1852, entitled, "*An Act to regulate the mode of suing the bonds of Executors, Administrators and Guardians.*" *Evans et al. vs. Lipscomb et al.* 71
2. Where a testator nominates two executors—one of whom only qualifies—employs an attorney in behalf of the estate, and dies before the services are paid for, and the other executor qualifies, he is liable to be sued as such in a Court of Law for the fee. *Williams et al. vs. Walker et al.* 195
3. The payment of money by one executor into the hands of a co-executor on notes given by himself to the other for the purchase of property belonging to the estate sold by the co-executor, is not such an act, of itself, as will charge such executor with the subsequent waste or misapplication of the funds of the estate by the other executor. *Mosely et al. vs. Floyd et al.* 564

4. After being clothed with his fiduciary character, the declarations, admissions and promises of an executor or administrator are admissible against the estate, in any suit by or against the representative in that character.
Lawson vs. Powell..... 681
9. Admissions by the administrator are admissible to charge the assets of his intestate. *Floyd vs. Wallace*..... 688

FAILURE OF CONSIDERATION.

See Contract, 1.

FORMER RECOVERY.

1. "To determine whether a former recovery is a bar to a subsequent action, a good test is, whether the same evidence will support both actions." *Lynch vs. Jackson*..... 668
2. Where a suit is brought against one individually, and he defends under the title of another, to make the judgment a bar in another suit, at the instance of that third person, the *pleadings* should show that there was privity in representation between the defendant and that third person. *Ibid*.
3. When a trust terminates before final judgment in a case, the *cestui que trust* should be made a party, by notice or otherwise, to the proceeding; otherwise, the judgment is no bar. *Ibid*.

FRAUD.

1. When a suit is pending against two, one of whom is entitled to a good defense, and counsel is employed to file that defense, and a judgment is given, subsequently, on the agreement of the plaintiff's counsel, and the other defendant on indulgence to such other defendant, the agreement is a fraud on the other defendant, and does not bind him.
Sharman vs. Morton..... 24
- See Equity*, 11. *Charge of the Court*, 3. *Fraudulent Conveyances*, 1.

FRAUDS—STATUTE OF.

1. A verbal contract made on the 14th December, 1856, for the rent of house and lot, for the year 1857, is an agreement

not to be performed within the space of one year from the making thereof, and, therefore, void under the Statute of Frauds, &c. *Atwood vs. Norton*..... 507

2. Land of J. C. & W. was sold at public outcry, and bid off and paid for by one S.—J. C. & W. being present and assenting to the sale, but no deed or memorandum in writing thereof was ever made to S., in execution of that sale. S. subsequently sold and conveyed the land by his own warranty deed, and as his own, to one K. On the trial of ejectment brought by J. C. & W. against K. for the land: *Held*, that the sale and purchase by S. did not defeat their title, nor were they estopped by that sale; although they had previously agreed, in writing, that the land should be sold, and had also appointed S. for them, and in their name, as their attorney, to sell the land.
Kellam vs. Doe ex dem Allen et al...... 544

FRAUDULENT CONVEYANCES.

1. A deed made, pending a suit to a trustee for the benefit of the wife and children, to defeat the collection of such recovery as might be had in that suit, is fraudulent and void as to the judgment recovered in that suit, whether the grantees had notice of the fraudulent intent or not.
Wise et al. vs. Moore..... 148
- See Equity*, 11, 12. *Gift*, 4.

FREEDOM.

1. The question, whether negroes are free or slaves, cannot be adjudicated under a possessory warrant. *Cone vs Force*.... 328

GEORGIA MILITARY INSTITUTE.

1. The Georgia Military Institute cannot be made chargeable through its Board of Trustees, upon a contract, made with the Board of Visitors—the latter acting under a special delegation of power from the State, within the scope of their authority. *Georgia Military Institute vs. Simpson*..... 273
2. Is the Georgia Military Institute sueable at all?—*Query. Ibid.*

GIFT.

1. The *general rule* governing parol gifts of chattels, is, that to constitute a valid gift, there must be an actual delivery of the chattel at the time of the gift, accompanied by words characterizing the act as a gift; and the act done and the words spoken must clearly establish the transfer of dominion over the chattel from the donor to the donee.
Evans et al. vs. Lipscomb et al...... 71
2. A delivery of a chattel preceded and followed by declarations of the party delivering it, that he had given the chattel to the party receiving it, though none of those declarations were precisely contemporaneous with the act of delivery, may constitute a valid gift, *provided* that the delivery be followed by a continuing possession in the party setting up the gift, of such a character as to indicate an abandonment of dominion by the former owner, and its acquisition by the possessor; and all the facts evincing change of dominion should be closely scrutinized. *Ibid.*
3. A father sent a slave to his son, by "*a little boy*," the child of that son, in the year 1837, calling no witness to the gift, and using no words at the time creating a trust, or placing any limitations or conditions upon the gift. The son received the slave, treating her as his own, and paid taxes for her as such, and she was generally known as his property; was seized in execution and sold for his debts, but permitted by the purchaser to return to his possession, that he might have an opportunity of redeeming her: *Held*, that in a suit against this son, for the slave, by a vendee of the purchaser at Sheriff's sale, the testimony of defendant's father, (then eighty-five years of age,) taken after a lapse of more than twenty years, that the gift, in 1837, was to the wife and children of defendant, and not to himself, is insufficient to bar a recovery by plaintiff. *Lemon vs. Wright*.... 317
4. A parol gift, as above described, cannot, by deed of the donor, made in September, 1839, by procurement of the son, be so qualified as to vest the property in the son as trustee for his wife and children, in prejudice of the rights of a creditor to whom the son became indebted in 1838, who commenced suit for the recovery of his debt in July, 1839, and recovered judgment in January, 1840; nor in prejudice of the rights of a purchaser of said slave, at Sheriff's sale, under that judgment. As against such creditor or purchaser, the deed is a nullity. *Ibid.*
See Deeds, 2.

GRANTS.

1. It is not necessary to the validity of a grant of land from the State of Georgia, that there should be a recital in the grant, that the Surveyor of the county wherein the land is situated, had advertised his survey of the premises granted, according to law. *Doe ex dem Dooly vs. Roe & McCurley*. 596
2. In an action to try the title to real estate, between parties both of whom claim title by grant from the State of Georgia, a grant will not be held invalid, because it conveys to one person more than one thousand acres of land. *Ibid*.

GUARDIANSHIP.

1. In Georgia, no one has a right to the guardianship of an infant under the age of fourteen years, other than his own; but the power of appointment is vested in the Ordinary, for the benefit of the child. *Watson vs. Warnock*..... 719
2. On an appeal from the grant of guardianship to the Superior Court, the whole case goes up to be tried anew. The discretion given by law to the Ordinary, vests by the appeal in the Superior Court for the purposes of that trial. *Ibid*.
3. The question for trial in the Superior Court is one of fitness for the office, and therefore a proper one to be submitted to the Jury on the proofs. *Ibid*.
4. The requests of the parent of the infant, on his death-bed, as to the guardianship of the person and property of the child, is a proper circumstance to be considered by the Jury, and, all other things being equal, sufficient to turn the scale. *Ibid*.

HUSBAND AND WIFE.

1. A conveyance from a husband to his wife directly, will be supported in Equity, as against his representative, under circumstances showing the absence of fraud, and a clear intention to settle the property upon her, or upon her and her children, especially if he derived the property through her. *Johnson vs. Hines*..... 720
- See Separate Estate*, 1.

INDORSERS.

See Sureties and Indorsers, 2. *Promissory Notes*, 1.

INJUNCTION.

1. In an application to dissolve an injunction, new matter not responsive to the allegations of the bill cannot be considered, especially when the new matter is immaterial.
Laub et al. vs. Burnett et al...... 304
2. An injunction will be refused on the coming in of the answer, if the equities are fully denied. *Cross vs. Payne*..... 342
See Equity, 4, 8, 13. *Equity Practice*, 1.

INSANITY.

1. The doctrine of moral insanity, or irresponsibility for crime, from an inability to control the will, from the habit of indulgence, has no foundation in the law, and the consciousness and consciences of mankind, in all ages, have been opposed to it. *Choice vs. The State*..... 424
See Criminal Law, 17, 18, 19, 23.

INTERROGATORIES.

See Practice, 6.

JUDGMENT.

1. A judgment of a sister State, authenticated according to the Act of Congress, is conclusive on the defendant as to all questions that he could have been heard on in the Court when and before the judgment was rendered, but does not preclude the defendant from pleading any special matter in avoidance of the judgment, such as fraud in its rendition, want of notice, &c. *Sharman vs. Morton*..... 34
2. Pleas of infancy, *non est factum*, and want of consideration in and to the note, or cause of action on which a judgment is rendered, are not proper replies to a suit on the judgment. *Ibid.*
3. An order of Magistrates, or of a Magistrate, before whom a possessory warrant is returned, dismissing the warrant, without any reason stated in the order, or appearing in the record, will not be regarded as an adjudication of the right of possession in favor of the defendant, but as a non-suit, or dismissal in the nature of a non-suit.
Roseberry vs. Roseberry..... 122

4. It is the duty of the Magistrate, or Magistrates, trying such a case, (unless it be dismissed on motion of plaintiff's counsel, or by reason of some defect or informality, without a decision on the merits,) if they find, from the evidence, that the property in dispute was last in the peaceable possession of the defendant, to give judgment in his favor, and order the property to be delivered over to him, upon his compliance with the requisitions of the Statute. *Ibid.*

See Former Recovery, 2, 3. Fraud, 1.

JURISDICTION.

1. The Courts of Equity of the State of Tennessee have jurisdiction of persons residing in the State of Georgia, who are parties to proceedings in that Court, and who appear and answer, and are heard in the same.
Loyd, Perryman & Mills vs. Hicks..... 140

See Executors and Administrators, 2. Equity, 19. Divorce, 1.

JURY.

1. The Law providing that in the same county, the Judge of the Superior Court shall draw a panel of Grand Jurors and a panel of Petit Jurors for each week of the Term of the Superior Court, does not disqualify a Juror from serving more than one week of the Term. It, at most, only confers a privilege of exemption, which may be waived. And if the same Jurors who served during the first week, voluntarily serve during a week intervening, as stated in the previous note, and a defendant in a criminal case consents to be tried during that week, and fail to challenge the array of Jurors when presented, a motion in arrest of judgment after conviction will not be sustained.
McAfee vs. The State..... 411
2. A Jury having had the case in charge for several hours, and being unable to agree, were informed by the Sheriff, in whose custody they were, that "unless they should agree speedily, the Judge would take them with him to Elbert county, and that he (the Judge) was making preparations for that purpose." *Held*, that this was a sufficient ground for setting aside the verdict and awarding a new trial, even though the representations made by the Sheriff be untrue.
Gholston vs. Gholston..... 626

3. In polling a Jury, the better course is to begin with a distinct reading of the verdict returned, calling their attention to it, and then (calling them *seriatim* by name) to propound to each the question, "What say you, Mr. Juror, is this your verdict, or is it not?" But where there is a genuine verdict for the defendant, the question, "Mr. Juror, do you find for the plaintiff, or for the defendant?" is equivalent, and the polling legal. *Black et al. vs. Thornton*..... 641
4. The Jury being polled in this form, each Juror answered, that he found for the defendant, but some four or five added, each for himself, to the response, that "he was not satisfied," or "not fully satisfied," or said, "he was not fully satisfied, but with the lights before him, found for the defendant;" *Held*,
 1. That freedom from doubt, especially where the finding was for the defendant, is not required.
 2. That a verdict so rendered is unanimous and legal. *Ibid.*

LANDLORD AND TENANT.

1. The relation of landlord and tenant must exist, to maintain the action of use and occupation; that is, there must be a contract either express or implied, and it cannot be implied when the possession is adverse to the title.
Littleton vs. Wynn..... 583

LEX FORI.

1. The grounds of divorce are regulated by the *lex fori*.
Standridge vs. Standridge..... 223
- See Contract, 2.*

LIEN.

1. Livery-stable keepers have no lien as such, but they may acquire a lien by special contract.
Jackson, Cook & Co. vs. Holland 339

LIMITATION OF ACTIONS.

1. If J. collects money for C., and, when sued by C. on a different demand, claims as a credit an amount paid to G., for C., the Statute of Limitations will not interpose to protect J. from accountability to C. for the money then collected and paid out for C. *Collins vs. Loyd*..... 625

2. A payment made by a debtor to one who is a merchant, on a note then due to him, on the Sabbath day, is not such acknowledgment of the debt as from which the Law will presume a promise to pay sufficient to take the case out of the Statute of Limitations. The transaction being in violation of the Law, no binding promise, either express or implied, will be presumed therefrom, to prevent the statutory bar from attaching to the debt.
Dennis vs. Sharman et al...... 607
See Dower, 1.

LIMITATIONS OF ESTATES.

1. There being in a marriage settlement after the termination of two estates for life, and upon failure of issue of the marriage, a limitation over "to the heirs of S. A. (the grantor.*)" *Held*, that the remainder-men took *as heirs*, not as purchasers. *King et. ux. vs. Dunham et. al.*..... 743

LIVERY STAPLE KEEPERS.

See Lien, 1.

MISTAKE OF LAW.

1. Mistake of Law is a good defense against an action to recover money, under a contract of purchase, where there is a full knowledge of all the facts; *provided*, the mistake be clearly proven, and the plaintiff cannot, in good conscience, receive the money sued for. *Collier vs. Perkerson et. al.* 117
2. The defense is available (the proofs being clear and indisputable,) in an action brought by a Sheriff for the use of a defendant in execution against the first purchaser at a Sheriff's sale, to recover the difference in amount between the first and second sale, under the Act of the 27th December, 1831, *Cobb's Digest*, 531. *Ibid.*

MONEY SENT BY MAIL.

See Payment, 2.

NEW TRIAL.

1. When a new trial is moved for, on the ground of newly discovered evidence, and the facts expected to be proved con-

- stituting the newly discovered evidence, are stated in the affidavit of the witness, are strong, and the verdict rather preponderates against the evidences anyhow, a new trial ought to be granted, if the newly discovered evidence would completely turn the scale. *Sharman vs. Morton*..... 34
2. Newly discovered evidence, notwithstanding it relates to the verbal admissions of the party, going to show that he has recovered wrongfully, is a good ground for granting a new trial. *Collins vs. Loyd*..... 126
3. When the verdict of the Jury is strongly and decidedly against the weight of evidence in a criminal case, the Court will order a new trial. *Aaron vs. the State*..... 167
4. When the verdict is decidedly against the weight of evidence, a new trial will be granted.
Doyal et. al. vs. Smith et. al...... 196
5. When four are indicted for disturbing religious service, and one of them, who participated in the disturbance, is convicted, a new trial will not be granted on the ground that the verdict is contrary to evidence, there being sufficient evidence to warrant the conviction. *Stewart vs. the State*. 222
6. Where all the evidence has been allowed to go before the jury, and the Court is satisfied that the verdict is fully sustained by the proof, and the ruling of the Court upon the case is more favorable to the defendant than he had any right to ask or expect, a new trial will not be granted.
McGinniss vs. the State..... 236
7. When a bill is filed to rectify a deed of gift, and upon satisfactory proof, supported by strong corroborating circumstances, the Jury decree for the complainant, and the Circuit Judge refuses to grant a new trial, this Court will not disturb the Judgment, especially where the question is one of fact only. *Webster vs. Brazelton et. al.*..... 284
8. Where the damages are excessive, resulting probably from the fact that the whole Law of the case has not been presented so full to the Jury as it should have been, a new trial will be ordered. *Beggarly vs. Craft*..... 309
9. A new trial will not be granted when the verdict can be supported by the evidence. *Palmer vs. Clark and wife*... 351

10. When the verdict of the Jury is for the plaintiff, and there is sufficient evidence to authorize and require the Jury to so find, and the Court below grants a new trial, that Judgment is erroneous and will be reversed.
Augusta Manufacturing Co. vs. Wellborn..... 365
11. The interference by this Court with the discretion of the Court below in granting or refusing new trials is made a duty by the New Trial Act of 1853-4. *Ibid.*
As
12. A motion for a new trial, on the ground of newly discovered evidence, is properly refused, if it appear, first, that two of the witnesses whose evidence is alleged to have been newly discovered were subpoenaed by the defendant, and in attendance, and that the third proves the same facts as they—due diligence not having been shown; secondly, that the newly discovered evidence is only cumulative; thirdly, that their knowledge, showing a conspiracy had not been communicated to the defendant before the stabbing; fourthly, that the newly discovered evidence would not, probably, and should not have varied the result.
McAfee vs. the State..... 411
13. When the Law has been substantially administered, and the evidence is doubtful, to say the most of it, the verdict of the Jury will not be disturbed. *Hadley vs. Ellis*..... 492
14. When the verdict of the Jury is strongly and decidedly against the weight of the evidence, and the Court is satisfied that justice has not been done, a new trial will be granted.
Maddox vs. Simmons & Griffin..... 512
15. There being but one witness to a material point in a case, and he standing self-contradicted before the Jury, a new trial will not be granted, because the Jury found against his evidence. *Strozier vs. Carroll*..... 557
16. A party to a libel for divorce, who may be dissatisfied with the *first* verdict, has a legal right to move that the verdict be set aside, and a new trial granted.
Gholston vs. Gholston.. 625
17. The Sheriff having a Jury in charge, represented to them that the presiding Judge intended to, and was making arrangements to take them with him to another county unless they speedily agreed upon a verdict. *Held*, that

this was sufficient for a new trial, even though the representation were untrue. *Ibid.*

18. When the verdict is without evidence, a new trial must be granted. *Gault & McPherson vs. Carmichael & Co...* 787
 19. When a fact is abundantly and confessedly proven by the testimony on both sides, the admission of immaterial evidence to the same point, though illegal, will not entitle the opposite party to a new trial. *Desverges vs. Desverges...* 753
- See Criminal Law, 25. Error, 3. Newly Discovered Evidence, 1. Practice, 7. Verdict, 1.*

NEWLY DISCOVERED EVIDENCE.

1. When counsel for movant states, in his place, that the evidence is newly discovered, and the affidavit of the witness by whom the new facts are to be proved, states that he had not previously communicated the facts to him, this is sufficient evidence of its being newly discovered to authorize the Court to grant the new trial. *Sharman vs. Morton.....* 35
- See New Trial, 1, 2, 12.*

NOTICE.

1. A purchaser without notice of a voluntary deed, is not protected as against such deed, unless both parties derive title from the same source. *Palmer vs. Clark and wife.....* 351
2. A mere rumor or vague report brought to the knowledge of a purchaser for valuable consideration, at or before the purchase, that there was an outstanding claim, or conveyance, or by, or to, whom made, is not such notice as will vitiate his title in favor of a volunteer.
Black et. al. vs. Thornton..... 641
3. A volunteer will be preferred over a purchaser for value with notice of the volunteer's title. *Ibid.*
4. Under the facts of the case of *Black et. al. vs. Thornton*, a conversation between the donor who was defendant in *fi. fa*; his son who was the father of the donees in the voluntary deed, (under age at its date,) and who by the terms of the deed, took a usufruct in the property; the purchaser at

Sheriff's sale when the property was sold, and a person specially selected as adviser and witness in the matter, occurring before the sale and referring to matters in dispute in the case, held to have been properly admitted in evidence, and considered by the Jury in determining the question as to whether the purchaser at said sale had notice of the voluntary deed. *Black et. al. vs. Thornton*..... 642

PARTIES.

1. In a suit by the Sheriff to recover the bid of a purchaser at Sheriff's sale, it is no misjoinder of parties to introduce as usces, the names of several plaintiffs in *fi. fas.* all of whom claim a participation in the fund sued for, and whose interests are of the same nature. *Glenn vs. Black. et al.* 393
 2. Parties not appealing from a first verdict are bound by it. *Pierce vs. Chapman et. al.*..... 674
- See Banks and Banking, 2.*

PARTNERS AND PARTNERSHIP.

1. When money, belonging to plaintiff, in the hands of one partner of a firm, by whom it was collected for the plaintiff, is used by such partner in the business of the firm, the firm is liable to plaintiff for the same, whether the money was known by the other partner to be the money of the plaintiff or not. *Welker vs. Wallace*..... 362
2. The liability of one of two defendants, depending upon the question whether he was the partner of the other, who signed a note sued on with a signature purporting to be that of a firm, and of articles of partnership between them being offered in evidence, and their execution proven, it is not competent for the defendant, resisting a recovery against him, on cross-examination to ask the witness who proved the execution of the articles, what was said between the parties contracting, immediately after the execution of the articles, as to reason why a firm-name was not adopted, and also as to the right of one partner to sign the name of other. *Pursely vs. Ramsey*..... 402
3. In such a case, it is competent for the plaintiff, by proving dealings of the defendants with other persons, before the making of the note sued on, to show dealings on joint ac-

count, the use of a firm-name, and its recognition by both parties. *Ibid.*

4. It is not necessary that a firm-name be inserted in the articles of partnership. The name in which their business is done, and by which they are generally known, becomes legitimately their firm-name. *Ibid.*
5. Declarations of one partner, in the course of casual conversations, are incompetent to show either a dissolution of a partnership, or, (if that were established by other evidence,) to affect parties not present, with notice of a dissolution. Public or personal notice of a dissolution of a co-partnership once existing, is necessary to affect persons not previously dealing with the firm. *Ibid.*
6. Three persons being partners in mercantile business, evidence that one of them sold out his interest in the stock of goods on hand, but not in the notes, accounts, and other assets of the firm, to a fourth party, who formed a new mercantile partnership with the other two under a different firm, style and name, is not *per se* proof of a dissolution of the first partnership. *Cody vs. Cody et. al.*..... 618

PAYMENT.

1. A Clerk of the Superior or Inferior Court is not authorized, by Law, to collect money on judgments or executions obtained in, or sued out of, their respective Courts, and a payment made to a Clerk, on a judgment or execution, is not good as a payment against the plaintiff.
The Bank of Georgetown vs. Ault & Ault..... 359
2. Money sent by mail to a creditor is no payment, unless the debtor have express authority to send it in that mode, or such authority can be inferred from a usage in business to that effect. *Morton vs. Morris*..... 378
3. That a note was given as a payment, and not as a mere memorandum, may properly be inferred from a receipt given therefor, in which the note is treated the same as money paid at the same time, and from the fact that two and a half years elapsed before any attempt is made to treat it other than as a payment. *Mosely et. al. vs. Floyd et. al.*... 564

PERJURY.

1. An action of Trespass was brought by A. against B. for forcibly entering upon his premises, and cutting down and carrying

off his timber trees, and removing his fence and gate. C. was examined as a witness in the case, and not only testified as to the particular injury charged in the case, but also as to the damage done the plaintiff's stock; denying that he (the witness) had any interest in the same. *Held*, that all these statements were material in the case, and that if he swore knowingly, wilfully, absolutely and falsely, as to any of them, he was guilty of perjury.
Salmons vs. Tait..... 676

PLEADING.

1. Pleas of infancy; *non est factum*, and want of consideration in and to the note, or cause of action on which a judgment is rendered, are not proper replies to a suit on the Judgment. *Sharman vs. Morton*..... 34
See Contract, 1.

PRACTICE.

1. When the presiding Judge, in the absence of the party for whom the motion for new trial is made, has a doubt whether the additional evidence stated, is newly discovered, the Court ought to grant the Rule *Nisi*, so as to give the party an opportunity to be heard on that subject.
Sharman vs. Morton..... 34
2. It is an extreme case, which will justify the Court in dismissing the plaintiff's case for not answering interrogatories filed by defendant under the Acts of 1847 and 1850—especially where service has been made on counsel only—the party having removed beyond the jurisdiction of the State, and to parts unknown, before the filing of the interrogatories. It would be better, generally, in the first instance, to impose terms less stringent. *Dawson vs. Callaway*..... 47
3. When a case has been withdrawn or dismissed, without a finding by the Jury on the facts on which the defense rests, and the Court below allows it to be reinstated, this Court will not interfere with that discretion.
Vanzant, Jones & Co. vs. Arnold, Hamilton and Johnson. 210
4. If no plea is filed at the appearance-term, the case—under the Act of 1799—is in default, and the Court has a right, if it be insisted upon, to require the cost to be paid before the default can be opened.
Johnson, Mitchell & Co. vs. Durham, Alling & Co..... 335

5. If the general issue, or any other plea, has been filed, and the defendant claims the right to amend his answer by filing an additional plea, the Court has the right to exact the cost as the price of this privilege and to reject the plea, if it be not paid. *Ibid.*
6. Commissions to take the depositions of witnesses, in answer to interrogatories, being returned into Court, and opened more than one day before the cause was called for trial, a party, who upon inspection of the papers so returned endorsed upon them certain objections in writing, (for causes other than irrelevancy,) but does not call the attention of the Court to them before the cause is submitted to the Jury, is not entitled to be heard upon them, when, in the progress of the cause, the depositions are offered in evidence. The objections must not only be "*taken*" but "*determined*," before the cause is submitted to the Jury. The onus is upon the party objecting, to invoke, in due time, the judgment of the Court upon his objections.
Gholston vs. Gholston..... 625
7. The Court below commenced the final charge to the Jury before twelve o'clock on Saturday night, and concluded it after that hour. The Jury remained in their room until after the Sabbath had passed away, and then returned their verdict: *Held*, that this does not vitiate the verdict, notwithstanding there may be reason to believe that they came to an agreement on the Sabbath day, and notwithstanding the Judge caused the Jury, by consent of parties, to come into Court on the Sabbath, but upon the withdrawal of the consent by one party, remanded them before the verdict had been read. *Ibid.*
8. Notwithstanding proceedings have been irregularly conducted, yet, if no principle has been violated or right infringed, and the parties have reached the same result as they would have attained if everything had been formally transacted, the matter will not be disturbed.
Barksdale vs. Smith, Bell & Co..... 671
9. Where, in a contest for the administration of an estate, the sole distributee of which was an infant, the record of a judgment, in the same Court, and between the same parties being offered in evidence, it was not error in the Court to refuse an application of counsel objecting to its admission, to suspend the cause on trial, and allow him time to except to the judgment offered in evidence, and obtain a

supercedeas, with a view to its exclusion as evidence.

Watson vs. Warnock..... 694

10. In *ex parte* proceedings, under special authority, great strictness is required.

D'Antignac vs. City Council of Augusta..... 700

11. In proceedings under Statute authority, whereby a man may be deprived of his property, the Statute must be strictly pursued. Compliance with all its prerequisites must be shown. *Ibid.*

See Criminal Law, 12, 14. *Witness*, 6.

PRACTICE, SUPREME COURT.

See Equity, 8, 20. *New Trial*, 7. *Practice*, 3.

PRISON BOUNDS.

1. When one is arrested under Ca. Sa. and gives bond for prison bounds, and subsequently escapes therefrom, the fact that the plan of the prison bounds has not been returned and recorded on the Minutes of the Superior and Inferior Court as required by the Statute, does not affect the validity of the bond. *Galloway et. al. vs. Camp*..... 586

PROCESS.

1. Writing and signing a process on a separate paper from that on which the original petition is extended, and then placing the paper, containing the process, loosely within the folds of the petition, is not a compliance with that provision of the Judiciary Act of 1799, which requires that process shall be "*annezed*" to the petition. The process must be extended on the same paper on which the petition is written, or if on a different paper, the two must be firmly united by wax or tape, or in some other secure method. *Ballard vs. Bancroft*..... 503
2. The delivery of a copy of the process, with a copy of the petition to the defendant, is essential to perfect service, and to give the Court jurisdiction of the case. *Ibid.*

POLLING JURIES.

See Jury, 3, 4.

POSSESSORY WARRANT.

1. An order of Magistrates, or of a Magistrate, before whom a possessory warrant is returned, dismissing the warrant, without any reason stated in the order, or appearing in the record, will not be regarded as an adjudication of the right of possession in favor of the defendant, but as a non-suit, or dismissal in the nature of a non-suit.
Roseberry vs. Roseberry..... 122
2. It is the duty of the Magistrate, or Magistrates, trying such a case, (unless it be dismissed on motion of plaintiff's counsel, or by reason of some defect, or informality, without a decision on the merits,) if they find from the evidence, that the property in dispute was last in the peaceable possession of the defendant, to give judgment in his favor, order the property to be delivered over to him, upon his compliance with the requisitions of the Statute. *Ibid.*
3. If it appear that father and son live together on the premises of the father, where there are, also, certain slaves, previously the property of the father, and in his exclusive possession, but placed by him under the control and management of the son; and if he, capriciously, leave the premises, taking the slaves with him, the father is entitled to the restitution of them under a possessory warrant. *Ibid.*
4. The presumption of Law is against the freedom of negroes, held in servitude; and if the plaintiff, in a Possessory Warrant, make a *prima facie* case of rightful possession of negroes, it is not competent for the Magistrates' Court, before whom such warrant may have been returned for trial, to hear evidence of and to adjudicate the freedom of such negroes. *Cone vs. Force*..... 528

PROMISSORY NOTES.

1. Defendants negotiated notes with the following endorsement on the back: "For value received we assign the within notes to A., J. & H., and H. E., D. & Co., waiving demand and notice, and guarantee the payment of the same." Held, that the defendants are liable on said notes as indorsers.
Vanant, Jones & Co. vs. Arnold, Hamilton & Johnson.... 210
2. When the plaintiff does not rest his right to recover on the ground that he is an innocent holder, and without notice, and the note is payable to bearer, and seeks a recovery on

the merits of the contract, the defendant cannot inquire in to the title for the single purpose of defeating a recovery.
Hambright vs. Stover..... 300

RAIL ROADS.

1. A wood pile of the Macon & Western Railroad Company took fire, from the engine passing or standing near it, at the Jonesboro' Station, and the fire communicated from the wood pile to the plaintiff's house and destroyed it. *Held*,
 1. That the Road had the right to have the wood pile at that Station, in such quantities and to such extent as its agents or employees thought proper, &c.
 2. That it is error in the Court, after laying down the rule of defendant's liability correctly, to add a qualification that has the effect of negating such rule.
 3. To make the Road liable for the burning of the house, it must be shown affirmatively, that a fire originated from some act of gross neglect, or carelessness on the part of its agents or employees.
Macon and Western Railroad vs. McConnell..... 133

REFORMATION OF DEEDS.

See Equity, 24.

REVERSION.

See Action, 1.

RIOTOUS HOMICIDE.

See Criminal Law, 7.

SABBATH DAY.

1. A payment made by a debtor to one who is a merchant, on a note then due to him, on the Sabbath day, is not such acknowledgement of the debt as from which the Law will presume a promise to pay sufficient to take the case out of the Statute of Limitations. The transaction being in violation of the Law, no binding promise, either express or implied, will be presumed therefrom, to prevent the statutory bar from attaching to the debt.
Dennis vs. Sharman et. al..... 607
See Practice, 7.

SALE.

- 1 When goods are sold, and nothing is said as to the time of delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer—the seller being bound to deliver them whenever they are demanded, upon the payment of the price—the buyer having no right to the possession of the goods till he pays the price. *Allen vs. Hollis*..... 143
2. The assent of the vendee to take the specific chattel, and to pay the stipulated price, is equivalent to his accepting possession; and the effect of the contract is, to vest the chattel in the buyer, &c. *Ibid*.
- 3 “The condition of the above and foregoing obligation is such that, whereas the said Zadock Ford has this day taken possession of the money, notes, accounts, books, goods, and every thing belonging to the late firm of Ford & Speer, and agrees to pay all the firm debts. Now, should the said Zadock Ford pay all the demands, debts or claims against said firm, or cause it to be done, and save the said Hugh L. Speer harmless, then this bond to be null and void, otherwise to remain in full force and virtue.” *Held*, 1st. That this was a sale by Speer to Ford, and not an assignment in trust. And 2d. That being a sale, Speer was a specialty creditor only, and entitled to damages to the extent of the firm debts which he had paid. *Speer vs. Wilkins*..... 289
4. The plaintiff brought suit against defendant on account, in which were charged articles as sold to defendant “per Pate” and “per” others. In proof of the account, plaintiff introduced his book of original entries in evidence, and proved that he kept correct books. *Held*, in the absence of proof to the contrary, that the presumption was that the goods so charged were sold to defendant. *Chastain vs. Brown*..... 346

SET-OFF.

See Equity, 1, 2. *Contract*, 1.

SEPARATE ESTATE.

1. The 5th and 6th items of Testator's Will are: 5th, “I give to my son-in-law, John Thrash, the sum of five dollars, and no more, of my estate, both real and personal, for his full share.” 6th. “I Will that my beloved daughter, Mary B. Trash, that she shall keep the negroes she has now in her

SURETIES AND INDORSERS.

.. Before a surety can be discharged on account of indulgence given to the principal, the creditor must know that the surety is such. *Howell vs. Lawrenceville Manufacturing Co.*.... 663

. Does the remedy given by the Act of 26th December, 1826, to sureties and indorsers to compel suit on notes (by giving notice,) to be brought within three months, or they be discharged, affect the contract, or go only to the remedy? Query.
Vanzant, Jones & Co. vs. Arnold, Hamilton & Johnson. 210

TAXES.

See City Ordinances, 1.

TITLE.

When lands of the United States in the State of Alabama are entered, and paid for to the officers appointed by Law for that purpose, the certificate given by the Receiver to the purchaser, (although no patent appears to have issued,) is sufficient evidence of title to the land therein named in the holder to enable him to sue for, recover and hold such land under the same, according to the laws of force in that State.
Moore vs. Coulter..... 278

An exemplified copy (conforming to the provisions of the Act of Congress) of a testamentary paper, executed, published, probated and recorded as a last Will and Testament in the State of Maryland, may be a good muniment of title to real estate in Georgia, even though the Will was neither probated, nor recorded in this State.
Doe ex. dem. Doo'y vs. Roe & McCurley..... 593

If a voluntary deed for slaves be signed, sealed and attested, but not then delivered by the donor to the donee, or to any other person for him, and if, before the delivery of such deed, a third person purchase said property from the Sheriff who had levied on it as the property of the donor, advertised and exposed it legally to public sale, or from the grantor for a valuable consideration, such purchaser acquires a legal title to the slaves, as against the volunteers to whom the deed was delivered after such purchase, whether the purchaser had notice of such previous signing, seal-

he might convey and deliver her in accordance with original promise. *Lemon vs. Wright*..... 317

TRUSTS.

Equity, 14. *Gift*, 3, 4.

USE AND OCCUPATION.

Landlord and Tenant, 1.

VERDICT.

an the verdict is for an amount greater than the evidence warrants, the excess must be remitted, or a new trial be granted. *Loyd, Perryman & Mills vs. Hicks*..... 140

first verdict binds the party not appealing from it. *ce vs. Chapman*..... 674

Practice, 7. *Wills*, 1.

VOLUNTARY CONVEYANCE.

arty claiming title to property by deed of gift, is designated a volunteer, and a subsequent purchaser for a valuable consideration, without notice of the voluntary conveyance, is preferred in Law to the volunteer; but if he had notice before he purchased, the volunteer will be preferred to him. *Black et. al. vs. Thornton*..... 641

Title, 4.

WAIVER.

an one of the distributees of an estate consents to take a portion of property allotted to him, though unequal in value, it is a waiver of any objection for want of a just division. *verges vs. Desverges*..... 753

WARRANTY.

general warranty of soundness does not extend to future casualties of parturition. *Hambright vs. Stover*..... 300

WIFE'S EQUITY.

See Equity, 5, 6, 7.

WILLS.

1. The 9th item of testator's Will is as follows: "At my death, I give and bequeath to my beloved wife, Elizabeth Boynton, during her life-time or widowhood, the West hal of my land, with a good horse and farming tools for on horse; two cows and calves, and one year's provision fo the family, and household and kitchen furniture, sufficien for the use of the family; one bed and bedstead, for the us of the four younger children; and one cart and oxen, for th use of the family; also, Solomon's labor is to go to rais the children. When the youngest becomes of age, he shal be the property of my wife, Elizabeth Boynton, and als Floyd, a negro boy, and fifty dollars. for the use of the fam ily." The intended disposition as to Floyd being equivocal, and parol testimony being let in to show what was th intention. *Held,*

1. That the verdict of the Jury must be on the parol testimony, and not upon the sense of the words of the Will.

Doyal et. al. vs. Smith et. al......

See Separate Estate, 1. Title, 2.

WITNESSES.

1. Being an Attorney in the cause, does not render a witness incompetent, he not having testified to any fact derived from his client, or during the existence and by reason of the relation of client and Attorney. *Sharmon vs. Morton*.....
2. The Sheriff who sues a purchaser to recover a bid at Sheriff's sale, is an incompetent witness, unless indemnified against the cost. Otherwise as to a Deputy Sheriff, who neither made the sale, nor is a party to the suit.
Glenn vs. Black et. al......
3. On a motion to the Court to dismiss an action at Law, because no process had been annexed to the original petition and none appearing by inspection of the petition, the Clerk whose duty it was to annex the process, is an incompetent witness to prove that that duty had been performed.
Ballard vs. Bancroft.....

persons being sued as partners on a promissory note, by a firm name, and one of the three having pleaded *est factum*," whilst the other two made default; one so in default is incompetent on the score of in- as a witness, to prove the liability of the party plead- *est factum*. *Cody vs. Cody et. al.*..... 619

Rule of Law is, that the credibility of a witness is a to be determined by the Jury. *Strozier vs. Carroll*. 557

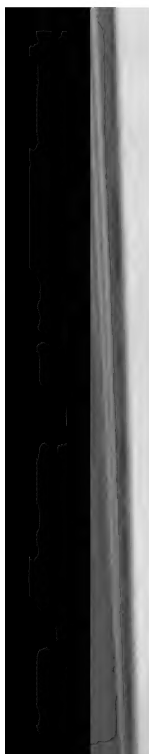
the object of a cross-examination is to show bias or ; so as to impeach the witness, great latitude ought allowed by the Court, and questions if answered in rnative that might tend in that way, is not objec- e. *Floyd vs. Wallace*..... 688

Criminal Law, 9, 13, 24.









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